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February 10, 1999

Ms. Sherry Estes
Associate Regional Counsel
United States Environmental Protection Agency - Region V
77 West Jackson Blvd.
Chicago, Illinois 60604-3507

Re: Skinner Landfill - Municipal Solid Waste Settlement
For the City of Deer Park

Dear Ms. Estes:

Pursuant to our earlier conversations, I have enclosed the following client specific materials ("shared information") for the City of Deer Park:

1. An excerpt from the Allocator's Preliminary Allocation Report assigning 6,802 cubic yards (uncompacted) to the City of Deer Park. This excerpt is specific to the City of Deer Park and does not disclose any information about other parties;

2. The Position Paper for the City of Deer Park; and

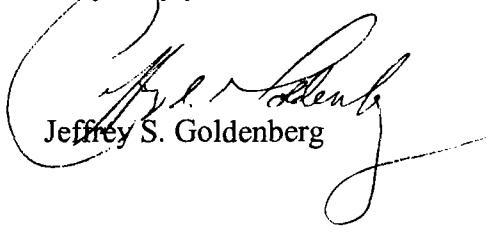
3. The City of Deer Park's ADR Questionnaire Responses.

These materials are being provided to you in an attempt to reach a mutually agreeable settlement pursuant to the terms of the EPA's Policy for Municipality Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (hereafter the "Policy") for the municipal solid waste deposited at the Skinner Landfill by the City of Deer Park.

According to the terms of the Policy and adopting the Allocator's findings, the City of Deer Park's liability for the municipal solid waste disposed at the Skinner Landfill would be $1,802.53 (6,802 cu yds * 100 pds/1cu yd * 1 ton/2000 pds * $5.30/1 ton = $1,802.53).

As you requested, the City of Deer Park is willing to sign a waiver regarding the applicable statute of limitations. If you need additional information or if you have any questions, please do not hesitate to contact me at your earliest convenience.

Very truly yours,



Jeffrey S. Goldenberg

Enclosures

cc: David O'Leary (w/o enclosures)
John C. Murdock, Esq. (w/o enclosures)

CITY OF DEER PARK ("Deer Park")

Deer Park's questionnaire response explained that from 1930 - 1957, it collected MSW but disposed of the waste at sites other than Skinner. From June 1957 until August 1960, Deer Park used the Skinner Site for disposal of MSW from residential and commercial entities within its borders on an emergency basis only. During that period, MSW was otherwise taken to other locations. From 1961 - 1990, MSW was taken to other locations, Deer Park said.

Deer Park had no information about the chemical constituents of the waste. It did interview its former Service Director, J. Henry Camp, who served from the late 1950s through the mid-1970s, however. Mr. Camp stated that there were no heavy industries within the city during that time frame. Deer Park said that this statement was verified by David O'Leary, current Safety-Service Director, who had prior conversations with Bill Geist (now deceased), a previous Service Department employee from 1946 - 1989. Deer Park believed that there were no commercial establishments occupying over 20,000 square feet or industrial establishments within the city.

Deer Park had no sewage or wastewater treatment plants in the City.

Regarding its use of Exhibit A haulers, Deer Park stated that from 1930 - 1984 waste was self-hauled by the City. During the period from 1977 - 1984, Deer Park self-hauled waste to Clarke Incinerator, Inc. Beginning in 1985 and continuing until December 31, 1990, the City contracted with Rumpke Waste, Inc. for transportation and disposal. The contract required Rumpke to use its own sanitary landfill as the *primary* disposal site. In support of its usage of Clarke and Rumpke, the City submitted copies of documents relating to disposal of waste for the following years with the vendors specified: 1977 [Clarke], 1978 [Clarke], 1979 [Clarke], 1980 [Clarke], 1982 [unspecified], 1983 [unspecified], 1984 [unspecified], 1985 [unspecified but contract is "on file in the office of the Director of Public Safety Service"], 1988 - 1993 [Rumpke].

Waste-in Amount. The city said that it used Skinner only on an emergency basis from 1957 - 1960, because its primary landfill closed in June 1957. The City used Skinner as its primary landfill for approximately 5 weeks, through July 1957, and, thereafter, began using Clarke Incinerator. There were two City Council meeting minutes which discuss the "dumping at Westchester, Ohio. In the minutes dated June 27, 1957, it was reported that the Camp Dennison Dump had been closed and that "we are now dumping at Westchester, Ohio." There was no indication of when the Camp Dennison dump closed. In the July 11, 1957 minutes, the same statement was made about dumping at Westchester.

Deer Park also submitted, confidentially, certain documents indicating arrangements with other landfills for disposal. The documents relate to dumping of waste at various sites other than the Skinner Site for the following years: 1932, 1933, 1950, [reference to 1951 in 1954 ordinance], 1954, 1956, and 1961 - 1975.

The City provided me with its good faith estimate of 455 tons of waste disposed of at the Site from 1957 - 1960. It assumed there were 18 loads per week based on a 1961 contract document with another landfill that was premised on an average of 20-22 loads per week. It reduced the number of loads based on a smaller population, I was told, although no population figures were provided to me to support this reduction.

In 1957 - 1960, the City used a 13 cy packer and a 7 cy open bed dump truck. It estimated that the packer hauled 9 loads per week and further estimated there were 3.6 tons per load. It further estimated that it used the Site for five weeks in 1957 based on Skinner log entries dated July 28, 1957 and August 1, 1957. Multiplying these figures produced an estimate of 162 tons. It then estimated the open bed dump truck was used to dispose of .35 tons x 9 loads/week x 5 weeks for a total of 16 tons (based on a density of 100 pounds per cy and 7 cy per load). Finally, it estimated that another 277 tons were disposed of by Deer Park at the Site from July 1957 - August 1960 based on the Skinner log entries. Those entries are on the following dates after August 1, 1957:

December 2, 1957	$22
January 9, 1958	$12
January 29, 1958	$ 6
February 24, 1958	$16
December 20, 1958	$28
March 21, 1959	$12
April 4, 1959	$18
June 24, 1959	$40 (or $40.20)
August 24, 1959	$28
October 20, 1959	$18
March 9, 1960	$42
May 1, 1960	$ 8
June 7, 1960	$36
August 8, 1960	$56
Total	$342

There is a July 29, 1957 entry for $20.00 and an August 1, 1957 entry for $172.00, for a total of $192.00 for the 5-week time frame. The average cost per ton would be $1.08, based on dividing $192 by 178 tons. Deer Park said. The City says that this cost is comparable to what it had been paying its former primary landfill immediately prior to the landfill's closing in June 1957. The City therefore assumed a charge of $1.08 per ton which increased $.05 per year for inflation ($1.13 in 1958, $1.18 in 1959, and $1.23 in 1960). Dividing these figures by the dollar charges per year produced a figure of 277 tons which the City added to the other figures above to produce a total waste in amount of 455 tons.

Waste-in Amount. I get to a result differently. I will accept the City's representation of 18 loads per week for the 13 cy packer and 7 cy dump truck. In other words, the City took 20 cys times 18 loads, or 360 cys per week, to the Site. For five weeks, it hauled 1,800 cys to the Site. The City was charged $192 for this amount of waste, or, $.1067 per cy. I do not include any amount for inflation in my analysis. At $.1067 per cy, $342 represents an additional 3,206 cys.

Of the 1,800 cys for the five weeks in 1957, and the 3,206 cys for the rest of 1957 through 1960, 13/20 are compacted cys that have to be uncompacted for purposes of consistency in the ADR process (I have assumed an equal number of dump truck loads and packer loads). For the five weeks in 1957, the uncompacted cy total for the packer is 1,170 cys (13 cys times 2 for a compaction ratio times 9 loads per week times 5 weeks). It is 315 cys for the dump truck (7 cys times 9 loads per week times 5 weeks). For the remaining 3,206 cys, 13/20 of this figure is 2,084 cys compacted, or 4,168 uncompacted cys. The

balance, 1,122 cys are uncompacted. Adding these four figures together produces a Skinner-log related waste-in total of 6,775 cys for Deer Park.

In addition, there was some deposition testimony from Rodney Miller, Ray Skinner, Elsa Skinner, and Maria Roy regarding disposal of Deer Park waste at other times. Elsa Skinner and Ray Skinner's testimony are covered by the Skinner log evidence. Taking Maria Roy's and Rodney Miller's testimony together, I have decided to assign Deer Park an additional 27 cys based essentially on Mr. Miller's testimony (4.5 cys x 6 trips). Thus, Deer Park's total waste-in amount is 6,802 cys.

Skinner Landfill
Alternative Dispute Resolution Process
Position Paper for the City of Deer Park

I. Waste Calculation as Requested by Allocator in May 8, 1998 Correspondence

Best Case/Worst (Same calculation)

The City of Deer Park appears in Elsa Skinner's logbook fourteen times between late June, 1957 and August, 1960. An interview with J. Henry Camp (previous Service Director for the City of Deer Park) indicated that the City only frequented the Skinner Landfill on an emergency basis from 1957 through 1960. This conclusion was verified by David O'Leary, the City's current Service Director, who had prior conversations with Bill Geist (recently deceased previous Service Department employee employed by the City from 1946 through 1989)(Affidavit of David O'Leary attached as Exhibit 1). This "emergency basis" use is consistent with the sporadic entries in Elsa Skinner's log book. It should be noted that the City of Deer Park used the Skinner Landfill as its primary disposal facility from late June 1957 through July 1957 (approximately a five week period) until it could find a permanent solution to its disposal problems caused when its primary landfill closed (see confidential documents supplied to Allocator along with Questionnaire responses). The interview with J. Henry Camp revealed that the City of Deer Park began transporting its waste to the Clarke Incinerator soon after its primary landfill closed sometime in June 1957.

As a result of the City of Deer Park's "full and thorough" investigation, it is apparent that the City's primary landfill closed sometime in June 1957. As a temporary solution to its solid waste problems, Deer Park used the Skinner Landfill as its primary dump location for approximately five weeks (late June 1957 through July 1957). This corresponds to the August 1, 1957 entry in Elsa's logbook. After July 1957, the City began transporting its municipal solid waste to the Clarke Incinerator. The sporadic logbook entries from December 1957 through August 1960 represent usage of the Skinner Landfill by the City when the City's primary waste disposal facility was unavailable.

Calculation

The number of tons of waste material transported to the Skinner Landfill by the City of Deer Park, as recorded in the fourteen logbook entries, is approximately 455 tons. See Questionnaire Responses 13(c) and (d) for the actual calculation.

II Factual Argument

A. Review and Analysis of Available Documents

The one piece of evidence uncovered during this ADR process which does not suffer from the same bias, self-servedness, memory lapses and post-hoc rationalizations that infect the Skinner family member deposition testimony is Elsa Skinner's log book. The City of Deer Park appears fourteen times in the logbook and believes that those entries represent the extent of the City's use of the Skinner Landfill. As a result of its "full and thorough" investigation, the City of Deer Park has been able to construct the following table which outlines the City of Deer Park's waste disposal history for nearly the entire time period which is the subject matter of this ADR process.

Waste Disposal History Table For City of Deer Park

Years	Landfill Name	Source of Information	Type of Waste
1932-1933		Confidential Materials (Feb. 12, 1932 Contract between Village of Deer Park and Stanley Rape)	Residential and other waste materials
1933- ?		Confidential materials (Resolution #24)	Residential and other waste materials
? - 1951		Confidential materials (Resolution No. 504-A)	Residential and other waste materials
1951- 1955		Confidential materials (Ordinance No. 682-A) (Contract dated Dec. 13, 1954)	Residential and other waste materials
1956		Confidential materials (Ordinance No. 734-A)	Residential and other waste materials

?- June1957		Confidential materials (City Council minutes, June 13, 1957)	Residential and other waste materials
June 1957 - July 1957		Confidential materials (City Council minutes, June 13, 1957)	Residential and other waste materials
July 1957	Skinner Landfill (West Chester)	Confidential materials (City Council minutes, July 11, 1957)	Residential and other waste materials
August 1957- 1960		Interview with J. Henry Camp (previous Service Director)	Residential and other waste materials
1961- at least 1968		Confidential materials (Ordinance Nos. 61-5, 61-43, 62-43, 63-33, 64-28, 65-38, 66-33, 68-63)	Residential and other waste materials
1970-1976		Ordinance Nos. 70-3, 71-27, 72-6, 72-19, 72-61, 73-44, 75-6	Residential and other waste materials
1977-1984		Affidavit of David O'Leary (attached as Exhibit 1)(Ordinance Nos. 77-29, 78-51, 80-2, 82-08, 83-05, 84-44)	Residential and other waste materials
1985-1990	The City of Deer Park entered into contract with Rumpke for the pick up and disposal of its waste.	Affidavit of David O'Leary (Attached as Exhibit 1)	Residential and other waste materials

As is evident from the above Table, the City of Deer Park can account for nearly all of the disposal locations for its waste materials during the relevant time period (1930-1990). Furthermore, the City has reviewed all records within its possession

custody or control. This review failed to turn up any documents (other than the 1957 City Council document referencing the West Chester Dump) directly referencing or indirectly linking the City to the Skinner Landfill. Thus, the results of the City's "full and thorough" investigation lead to the conclusion that the City used the Skinner Landfill on an emergency-only basis from 1957 through 1960.

B. Review and Analysis of Deposition Testimony

Elsa Skinner

Elsa Skinner's deposition testimony regarding the City of Deer Park does not refute the fact that the City used the landfill on an emergency-only basis. (November 20, 1997 deposition; pp. 318-319). When asked how frequently the City used the landfill, Elsa stated that she could not remember. *Id.* at p. 318, lines 9-11.

Maria Skinner

The concerted effort by the Skinner family to rope in as many participants is no more evident than with Maria Skinner Roy's testimony. During her deposition, Maria testified that the City of Deer Park used the landfill during the 1980s up until the landfill closed in 1990. (December 11, 1997 deposition; p. 203, lines 1-8). When asked why the City of Deer Park does not appear in the logbook during the 1980s, Maria states that the City could have paid in cash. *Id.* at p. 203, lines 7-24). Yet, according to David O'Leary, the City's current Safety-Service Director, it is not the City's policy to give its employees cash to pay for services. (Affidavit of David O'Leary, attached as Exhibit 1).

The absurdity of Maria's testimony is evident when one views all other available evidence. First, the City of Deer Park has been able to reconstruct its landfill usage during the entire 1980s. No records reveal a consistent use, or for that matter, a sporadic use, of the Skinner Landfill during this time period. A sophisticated city such as Deer Park would certainly have records indicating "weekly" usage of the Skinner Landfill as testified to by Maria. (December 11, 1997 deposition; p. 204, lines 21-22) The fact that no such records exist reiterates the most likely explanation for Maria's far-fetched deposition testimony – self interest and self preservation.

Even if Maria's incredulous testimony were to be taken as true, it is still insufficient to impose CERCLA liability upon the City of Deer Park. In order to

impose CERCLA liability upon a party, that party must have disposed of hazardous substances at the site. According to her own testimony, Maria was unable to link any hazardous substances with the City's alleged disposal. When asked what type of waste the City brought to the landfill, Maria stated "trees, shrubs, stuff like that." (December 11, 1997 deposition; p. 202, lines 16-17)

Ray Skinner

Ray Skinner's deposition testimony regarding the City of Deer Park is as unbelievable as his sister's. Although he can not remember when the City used the landfill, Ray states that the City hauled materials to the landfill at least once per month over a period of several years. (February 17, 1998 deposition; p. 962, lines 1-13). It appears from his testimony that Ray is referring to a period of time subsequent to the fourteen references to the City in Elsa's logbook (post 1960). Yet, Ray's testimony strains the imagination and smacks of bias and self-interest. According to Ray, the City of Deer Park used the Skinner Landfill on a monthly basis over a several year period. Yet, there is absolutely no documentary evidence indicating even a hint of usage by the City after 1960. In fact, as outlined in the Waste Disposal History Table For City of Deer Park, the City's disposal practices are clearly spelled out with documentary evidence to support each claim. A sophisticated city such as Deer Park would certainly have some records linking it to the landfill, especially in light of the City's alleged monthly usage over a several year period. Yet, no such documents exist. The explanation for this is simple: the City of Deer Park did not use the Skinner Landfill as described by Ray Skinner.

The outlandish nature of Mr. Skinner's testimony is further evidenced by his statements regarding the Clarke Incinerator. According to Ray, whenever the Clarke Incinerator was not operating because of a malfunction, Mr. Clarke directed his customers to the Skinner Landfill for disposal of their waste. (December 12, 1997 Deposition; p. 135, line 17). According to Dick Clarke, however, this simply was not the case. As Mr. Clarke stated during his deposition, it would make absolutely no sense for the Clarkes to recommend Skinner Landfill when their incinerator was not working because the Clarke's operated their own landfill near Morrow, Ohio from which they could reap the benefits of additional use (Richard Clarke Deposition, February 18, 1998; p. 220, lines 8-12).

Even if one were to accept Ray's testimony as true, it is inadequate to impose CERCLA liability upon the City of Deer Park. Ray admitted during his deposition that he never saw any garbage compactor trucks from the City of Deer Park. The only trucks allegedly from the City of Deer Park which Ray Skinner allegedly saw

were dump trucks with an 8-10 cubic yard capacity. *Id.* at p. 961, line 12. Furthermore, he could only recall "road waste" being brought into the landfill by the City. (February 17, 1998 deposition; p. 960, lines 1, 19-21)(See also February 18, 1998 deposition, p. 1224, 1225, lines 10-24, 1-14 where Ray states that he "truthfully" cannot remember shop waste being brought into the landfill by a particular municipality.) Thus, Ray's testimony does not establish the fact of disposal of municipal solid waste or any hazardous substance by the City of Deer Park.

Other Testimony

The deposition testimony of other individuals who worked at or frequented the Skinner Landfill also detracts from Elsa, Maria and Ray Skinner's biased and self-serving testimony. For example, Rodney Miller, who has worked at the property since 1973 and has lived there since 1978 (December 15, 1997 deposition, p. 12, line 17) was unable to personally recall seeing vehicles from the City of Deer Park at the landfill (*Id.* at p. 101, lines 1-10), despite the fact that the path taken by the trucks entering the landfill was located directly next to his metal storage area, thereby enabling him to see the trucks as they proceeded toward the landfill. (*Id.* at p.93, line 16-24) (see also David Jividen deposition, December 17, 1997; p. 109, lines 7-12; When asked whether Rodney Miller was in a position to see the trucks coming into the landfill and proceed toward the dump, Mr. Jividen responded, "He could've seen them, yeah".) Mr. Miller did recall seeing a private hauler's truck which was apparently carrying tree limbs and brush from the City of Deer Park. *Id.* at p. 103, lines 1-7. These material, however, are not hazardous substances.

Further detracting from the Skinners' credibility is David Jividen's testimony. Mr. Jividen worked at the landfill during the late 1980s. Although Mr. Jividen could recall the fact that cities did use the landfill, he could not specifically recall the name of any particular municipality (December 17, 1997 deposition, p. 80, lines 1-6). Furthermore, the only types of materials described by Mr. Jividen as being dumped in the landfill by these municipalities were non-hazardous materials (*Id.* at p. 80, lines 1-6) ("old guard rail and the wood pieces that go in the guard rail and the dirt").

Lloyd Gregory's testimony also supports the City's investigation results. Mr. Gregory lived on the Skinner property from 1987 or 1988 until 1993 (December 16, 1997 deposition, p.14, line 6). When asked if the City of Deer Park rings a bell as an entity which frequented the landfill, Mr. Gregory could not recall the City as a user of the landfill. (December 16, 1997 deposition; p. 100, lines 10-14).

Roger Ludwig's deposition testimony further supports the conclusion that the City of Deer Park did not use the Skinner Landfill. Mr. Ludwig began frequenting the landfill around 1974-75 as a result of his business relationship and dealings with John Skinner (February 3, 1998 deposition; p. 45-46, lines 10-24, 1-8). When asked specifically whether he had any recall of the City of Deer Park using the landfill, Mr. Ludwig had no recollection whatsoever linking the City to the landfill (*Id.* at p. 242, lines 8-16).

Charles Ringle frequented the Skinner Landfill as a garbage hauler on a daily basis from 1962 through 1967. (February 20, 1998 deposition; p. 16, lines 9-25 and p. 25, lines 20-24). During his review of the list of names compiled from Elsa Skinner's logbook, Mr. Ringle did not single out the City of Deer Park as a user of the landfill.

Clarke Incinerator, Inc.

Finally, it is important to address the City's use of the Clarke Incinerator, Inc. (transfer station) from 1977 to 1984. During this time period, the City of Deer Park would collect residential municipal solid waste as well as non-hazardous commercial solid waste with its own trucks and deposit this material at the Clarke Incinerator (See Affidavit of David O'Leary, attached as Exhibit 1). Clarke Incinerator vehicles would then transfer this material to either the Schlicter or the Stubbs Mill Landfill. None of these materials were taken to the Skinner Landfill. (Marty Clarke deposition; May 4, 1998, citation unknown) (Richard Clarke deposition; February 18, 1998, p. 220, lines 6-12; Richard Clarke states that when the incinerators were shut down, wastes from the transfer station were taken to the Clarke's own landfill)

Conclusion

When one evaluates the credibility of the testimony from the Skinner family members (particularly Maria and Ray), it is apparent that they are simply trying to cast a broad net to snare as many "deep pockets" as possible. Yet, beyond the fourteen entries in Elsa's logbook, it simply does not make sense for the City of Deer Park to have used the Skinner Landfill as extensively as Ray and Maria claim. No documentation whatsoever exists which evidences this usage. After all, Maria claims that the City of Deer Park used the landfill during the 1980s up until the landfill closed in 1990. (December 11, 1997 deposition; p. 203, lines 1-8). Yet, the City of Deer Park possesses absolutely no records indicating any such

usage. One would anticipate that a sophisticated city such as Deer Park which has been able to produce records of its waste disposal dating back to the early 1930s would certainly have records of its waste disposal during the 1980s. No such records exist because the City of Deer Park did not use the landfill during those time periods.

III USEPA Municipal Solid Waste Policy

On February 5, 1998 the US Environmental Protection Agency Office of Enforcement and Compliance Assurance released a memorandum outlining its Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL CO-Disposal Sites (attached as Exhibit 2). According to the memorandum "the purpose of this policy is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability under CERCLA of generators and transporters of municipal sewage and/or waste at co-disposal landfills on the National Priorities List (NPL) (*Id.* at 1). The basis behind the EPA's municipal solid waste policy is the fact that "although municipal solid waste may contain hazardous substances, such substances are generally present only in small concentrations. Landfills at which municipal solid waste alone was disposed of do not typically pose environmental problems of sufficient magnitude to merit designation as NPL sites. In the Agency's experience, and with only rare exceptions do MSW-only landfills become Superfund sites, unless other types of wastes containing hazardous substances, such as industrial waste, are co-disposed at the facility. Moreover, the cost of remediating MSW is typically lower than the cost of remediating hazardous waste." (*Id.*)

According to this policy, the EPA calculates a municipality's share of the response costs by multiplying the known or estimated quantity of municipal solid waste contributed by the municipality by an estimated unit cost of remediating municipal solid waste at a representative RCRA Subtitle D landfill (*Id.* at 3). EPA's cost per unit estimate for remediating municipal solid waste is $5.30 per ton.

If it is determined that the City of Deer Park disposed of municipal solid waste at the Skinner Landfill, the above described formula should be used to calculate the City's potential liability.

IV. Legal Arguments

A. No Joint and Several Liability

Pursuant to *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist LEXIS (S.D. Ohio March 18, 1996)(attached to Questionnaire Responses), Potentially Responsible Parties ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et seq. ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("SARA"), may not bring a claim pursuant to 42 U.S.C. § 9607(a), CERCLA § 107(a). In *AT&T Global Info. Solutions Co.*, the controlling authority for this action, the court held "that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all expenses incurred in the cleanup, but are limited to contribution recovery." *Id.* at *38 (citations omitted).

The *AT&T Global Info. Solutions Co.* court reiterated its holding in a March 31, 1997 Memorandum and Order stating:

> Plaintiff initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1). . .
>
> By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. **The Court held that plaintiffs, as potentially responsible parties, were not entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup.**

AT&T Global Info. Solutions Co. v. Union Tank Car Co., No. 2-94-876, 1997 WL 382101 at *1 (S.D. Ohio March 31, 1997); See also, *Dartron Corporation v. Uniroyal Chemical Company, Inc.*, 917 F.Supp. 1173, 1182 (N.D. Ohio 1996)("Actions for full cost recovery under § 9607(a) may only be brought by (1) federal or state governments; or (2) 'innocent' private parties.)

B. No "Arranger" Liability for Contracting with Rumpke

By contracting with Rumpke, a party alleged to have used the Skinner Landfill, for the pick-up, transport and disposal of residential and commercial waste, the City of Deer Park has not incurred "arranger" liability under 42 U.S.C. § 9607. Although "arranger" liability can attach to parties that do no have active involvement regarding timing, manner or location of disposal, there must be some nexus between the potentially responsible party and the disposal of hazardous substances. *G.E. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2nd Cir. 1992). A sufficient nexus may be established between a potentially responsible party (PRP) and the complained of hazardous substance, for purposes of holding a PRP liable as an "arranger" for CERCLA response costs, either by showing a PRP's actual involvement in the disposal of the hazardous substances or by showing a PRP's obligation to control hazardous substances. *Pierson Sand & Gravel, Inc. v. Pierson Tp.*, 851 F.Supp. 850 (W.D. Mich. 1994).

In the present situation, other than negotiating the waste disposal contract, the City of Deer Park had absolutely no involvement whatsoever in the actual physical disposal of the waste materials. Furthermore, the City of Deer Park had no obligation to control the alleged hazardous substances. These responsibilities belonged to B.F.I. Consequently, no "nexus" exists between the City of Deer Park and the complained of hazardous substances, and no "arranger" liability attaches to the City.

C. Orphan Share Allocation

Because plaintiffs are limited to a contribution action under 42 U.S.C. § 9613 as described above, they cannot seek to impose joint and several liability upon the Potentially Responsible Parties. Rather Plaintiffs can only seek "contribution" or "several" liability. *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist LEXIS (S.D. Ohio March 18, 1996). "Since liability under a § 113 action is several, not joint and several, each party is only responsible for their proportionate share of the harm caused at the [site]." *Gould Inc. v. A&M Battery and Tire Service,* 901 F.Supp. 906, 913 (M.D. Pa. 1995). Applying these principles, the *Gould* court concluded that the third party defendants could not be held responsible for any portion of the "orphan shares." Rather, the third party defendants could only be held liable for the amount which each defendant contributed to the harm. *Id.* (But see, *United States v. Kramer*, 953 F.Supp. 592 (D. N.J. 1997)(CERCLA contribution section permits allocation of portions of orphan share to liable third party defendants).

Although not directly addressed by the Sixth Circuit, the principles adopted by the *Gould* court should be applied to the present action. Any allocation of "orphan shares" related to the Skinner Landfill should be directed to the § 113 plaintiffs who are seeking contribution, not to the third party defendants who are simply liable for the amount which each defendant contributed to the harm.

D. Importance of Toxicity

The degree of toxicity of the particular waste attributed to each responsible party is a primary consideration among the "Gore Factors" or other equitable factors considered under 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1) for allocating contribution costs among responsible parties. As such, the degree of toxicity should be given significantly more weight than the volume of waste attributable to the responsible parties. *See, e.g., Control Data Corp. v. S.C.S.C Corp.*, 53 F.3d 930 (8th Cir. 1995), stating in pertinent part:

> A primary focus of these factors is the harm that each party causes the environment. Those parties who can show that their contribution to the harm is relatively small in terms of amount of waste, toxicity of the waste, involvement with the waste, and care, stand in a better position to be allocated a smaller portion of response costs.

Id. at 935 (citations omitted).

CERCLA, in the allocation stage, places the costs of response on those responsible for creating the hazardous condition. Allocating responsibility with a focus toward toxicity does just that because those who disposed of more toxic substances are more responsible for the hazardous condition. *Id.* at 938. *See also, Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F.Supp. 1509, 1514 (D. Oregon 1995)(following the *Control Data Corp.* Court's reasoning in heavily weighing toxicity as an equitable allocation factor).

To the extent that municipal solid waste is found to contain hazardous substances, thereby potentially subjecting municipalities to liability under 42 U.S.C. § 9613(f), such waste has an extremely low degree of toxicity. Therefore, in such cases, the low level of toxicity is a primary consideration under the "Gore Factors" or other equitable factors pursuant to 42 U.S.C. § 9613(f)(1), and require a significantly lower allocation in relation to industrial waste contributors.

The fact that municipal solid waste is of extremely low toxicity is reflected in and is the basis of the U.S. EPA's Interim Municipal Settlement Policy issued nearly nine years ago on December 12, 1989. 54 Fed. Reg. 51071 (1989). In this regard, the interim policy states:

> Although the actual composition of such waste varies considerably at individual site, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.

Id. at 51074.

The EPA's recently released Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (attached as Exhibit 4) also recognizes the fundamental difference in toxicity between MSW and non-MSW industrial waste.

> EPA recognizes the difference between MSW and the types of wastes that usually give rise to the environmental problems at NPL sites. Although MSW may contain hazardous substances, such substances are generally present in only small concentrations. Landfills at which MSW alone was dispose of do not typically pose environmental problems of sufficient magnitude to merit designation as NPL sites. In the Agency's experience, and with only rare exceptions do MSW-only landfills become Superfund sites, unless other types of wastes containing hazardous substances, such as industrial wastes, are co-disposed at the facility. Moreover, the cost of remediating MSW is typically lower than the cost of remediating hazardous waste. . .

Id. at 1. Recognizing these fundamental differences in toxicity between MSW and industrial wastes, the EPA has adopted a cost per unit for remediating MSW at $5.30 per ton. Thus, although all credible evidence leads to the conclusion that the City of Blue Ash did not dispose of any waste at the Skinner Landfill, if a contrary finding is made, any liability assigned should be dealt with in accordance with the EPA's MSW policy.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Dow Chemical Company, et al.,	)	Case No. C-1-97-307
	)	
Plaintiffs,	)	Judge Herman J. Weber
	)	
v.	)	
	)	
Acme Wrecking Co., Inc., et al.	)	
	)	
Defendants.	)	

Affidavit of David O'Leary

I, David O'Leary, after having been first duly cautioned and sworn, do hereby state as follows:

1. I am currently employed by the City of Deer Park as the City's Safety-Service Director.
2. I have been employed by the City of Deer Park for the past nineteen years, and, as a result, I am very familiar with the City's waste disposal practices.
3. During the City's "full and thorough" investigation in response to this ADR process, I had discussions with Bill Geist, a previous City employee employed by the City from 1946 through 1989.
4. During our conversation, Mr. Geist indicated that the City of Deer Park only frequented the Skinner Landfill on an emergency basis from 1957 through 1960.
5. The City of Deer Park used the Clarke Incinerator as a transfer station for the waste materials which it collected from 1977 through1984.
6. The City of Deer Park contracted with Rumpke for the pick up and disposal of its waste in 1985 and this contractual relationship extended through 1990.

7. Since I have been employed by the City of Deer Park, the City has never permitted its employees to pay for disposal services with cash.

Further affiant sayeth naught.

David O'Leary

Sworn to a subscribed in my presence this 20 day of May, 1998.

Notary Public
My Commission Expires 12/5/98

EXHIBIT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

Office of Enforcement and Compliance Assurance

February 5, 1998

MEMORANDUM

SUBJECT: Transmittal of Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites

FROM: Steven A. Herman
Assistant Administrator

TO: Addressees

This memorandum transmits the "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (MSW Policy). This policy supplements the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (1989 Policy) that was issued by the U.S. Environmental Protection Agency (EPA) on September 30, 1989.

Last year the Office of Site Remediation Enforcement (OSRE) formed an EPA work group to examine settlement options at co-disposal sites for parties whose liability relates to municipal solid waste (MSW). On July 11, 1997, EPA announced in the Federal Register issuance of EPA's Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites and began a 45-day comment period. The attached MSW Policy reflects EPA's review and consideration of the public comments received during the comment period.

The MSW Policy states that EPA will continue its policy of not generally identifying generators and transporters of MSW as potentially responsible parties at NPL sites. In recognition of the strong public interest in reducing contribution litigation, however, EPA identifies in the MSW policy a settlement methodology for making available settlements to MSW generators and transporters who seek to resolve their liability. In addition, the MSW Policy identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the NPL who desire to settlement their Superfund liability.

If you have any questions about the policy, please contact Leslie Jones (202-564-5123) or Doug Dixon (202-564-4232).

Addressees:

Linda Murphy, Director, Office of Site Remediation and Restoration, Region I
Harley F. Laing, Director, Office of Environmental Stewardship, Region I
Richard L. Caspe, Director, Emergency and Remedial Response Division, Region II
Conrad S. Simon, Director, Division of Enforcement and Compliance Assurance, Region II
Thomas C. Voltaggio, Director, Hazardous Waste Management Division, Region III
Richard D. Green, Director Waste Management Division, Region IV
Norman Niedergang, Director, Waste, Pesticides, and Toxics Division, Region V
William Muno, Director, Superfund Division, Region V
Myron O. Knudsen, Director, Superfund Division, Region VI
Samuel Coleman, Director, Compliance Assurance and Enforcement Division, Region VI
William A.J. Spratlin, Director, Air, RCRA, and Toxics Division, Region VII
Michael J. Sanderson, Director, Superfund Division, Region VII
Max H. Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Carol Rushin, Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII
Julie Anderson, Director, Waste Division, Region IX
Randall F. Smith, Director, Environmental Cleanup Office, Region X
Pamela Hill (Acting), Office of Regional Counsel, Region I
Walter Mugdan, Office of Regional Counsel, Region II
William Early, Office of Regional Counsel, Region III
Phyllis Harris, Office of Regional Counsel, Region IV
Gail C. Ginsburg, Office of Regional Counsel, Region V
Larry Starfield, Office of Regional Counsel, Region VI
Martha R. Steincamp, Office of Regional Counsel, Region VII
Thomas A. Speicher, Office of Regional Counsel, VIII
Nancy J. Marvel, Office of Regional Counsel, Region IX
Jackson L. Fox, Office of Regional Counsel, Region X

cc:

Timothy Fields, OSWER
Lois Schiffer, DOJ
Cliff Rothenstein, OSWER
Eric Schaeffer, ORE
Barry Breen, OSRE
Craig Hooks, FFEO
Lisa Freidman, OGC
Mike Shapiro, OSWER
Liz Cotsworth, OSW
Jim Woolford, FFRRO
Joel Gross, DOJ
Bruce Gelber, DOJ
Steve Luftig, OERR
Linda Boornazian, OSRE
Paul Connor, OSRE
Sandra Connors, OSRE
Ken Patterson, OSRE
Lori Boughton, OSRE
Randy Dietz, OCLA
Kevin Matthews, OCLA
Dan Winograd, Region I
Deborah Mellott, Region II
Charlie Howland, Region III
Chris Corbett, Region III
David Engle, Region IV
Mike Bellott, Region V
Cheryle Micinski, Region VII
Baerbel Schiller, Region VII
Jessie Goldfarb, Region VIII
Harrison Karr, Region IX
Roy Herzig, Region IX
Seth Bruckner, OERR
Dan Beckhard, DOJ
Alex Schmandt, OGC
Allen Geswein, OSW
Paul Balserak, OSW
Doug Dixon, OSRE/RSD
Leslie Jones, OSRE/RSD

Policy for Municipality and Municipal Solid Waste CERCLA Settlements
at NPL Co-Disposal Sites

I. PURPOSE

The purpose of this policy is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability under CERCLA[1] of generators and transporters of municipal sewage and/or municipal solid waste at co-disposal landfills on the National Priorities List (NPL), and municipal owners and operators of such sites. This policy is intended to reduce transaction costs, including those associated with third party litigation, and to encourage global settlements at sites.

II. BACKGROUND

Currently, there are approximately 250 landfills on the NPL that accepted both municipal sewage sludge and/or municipal solid waste (collectively referred to as "MSW") and other wastes, such as industrial wastes, containing hazardous substances. These landfills, which are commonly referred to as "co-disposal" landfills, comprise approximately 23% if the sites on the NPL. Many of these landfills were or are owned or operated by municipalities in connection with their governmental function of providing necessary sanitation and trash disposal services to residents and businesses.

EPA recognizes the differences between MSW and the types of wastes that usually give rise to the environmental problems at NPL sites. Although MSW may contain hazardous substances, such substances are generally present in only small concentrations. Landfills at which MSW alone was disposed of do not typically pose environmental problems of sufficient magnitude to merit designation as NPL sites. In the Agency's experience, and with only rare exceptions do MSW-only landfills become Superfund sites, unless other types of wastes containing hazardous substances, such as industrial wastes, are co-disposed at the facility. Moreover, the cost of remediating MSW is typically lower than the cost of remediating hazardous waste, as evidenced by the difference between closure/post-closure requirements and corrective action costs incurred at facilities regulated under Subtitles D and C of the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq. (RCRA).

On December 12, 1989, EPA issued the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (the 1989 Policy) to establish a consistent approach to certain issues facing municipalities and MSW generators/transporters. The 1989 Policy sets forth the criteria by which EPA generally determines whether to exercise enforcement discretion to pursue MSW generators/transporters as potentially responsible parties (PRPs) under §107(a) of CERCLA. The 1989 Policy provides that EPA will not generally identify an MSW generator/transporter as a PRP for the disposal of MSW at a site unless there is site-specific evidence that the MSW that party disposed of contained hazardous substances derived from a

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[1] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et. seq.

commercial, institutional or industrial process or activity. Despite the 1989 Policy, the potential presence of small concentrations of hazardous substances in MSW has resulted in contribution claims by private parties against MSW generators/transporters.

Additionally, the 1989 Policy recognizes that municipal owners/operators, like private parties, may be PRPs at Superfund sites. The 1989 Policy identifies several settlement provisions that may be particularly suitable for settlements with municipal owners/operators in light of their status as governmental entities.

Consistent with the 1989 Policy, the Agency will continue its policy to not generally identify MSW generators/transporters as PRPs at NPL sites, and to consider the performance of in-kind services by a municipal owner/operator as part of that party's cost share settlement. In recognition of the strong public interest in reducing the burden of contribution litigation, however, this policy supplements the 1989 Policy by providing for settlements with MSW generators/transporters and municipal owners/operators that wish to resolve their potential Superfund liability and obtain contribution protection pursuant to Section 113(f) of CERCLA.

III. DEFINITIONS

For purposes of this policy, EPA defines municipal solid waste as household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (e.g. yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills. A contributor of municipal solid waste containing such other wastes may not be eligible for a settlement pursuant to this policy if EPA determines, based upon the total volume toxicity of such other wastes, that application of this policy would be inequitable.[2]

For purposes of this policy, municipal solid waste and municipal sewage sludge are collectively referred to as MSW; all other wastes and materials containing hazardous substances are referred to as non-MSW. Municipal sewage sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage sludge, but does not include sewage sludge containing residue removed during the treatment of wastewater from manufacturing or processing operations.

The term municipality refers to any political subdivision of a state and may include a city, county, town, township, local public school district or other local government entity.

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[2] For example, such other wastes may not constitute municipal solid waste where the cumulative amount of such other wastes disposed of by a single generator or transporter is larger than the amount that would be eligible for a de micromis settlement.

IV. POLICY STATEMENT

EPA intends to exercise its enforcement discretion to offer settlements to eligible parties that wish to resolve their CERCLA liability based on a unit cost formula for contributions by MSW generators/transporters and a presumptive settlement percentage and range for municipal owners/operators of co-disposal sites.

MSW Generator/Transporter Settlements:

For settlement purposes, EPA calculates an MSW generator/transporter's share of response costs by multiplying the known or estimated quantity of MSW contributed by the generator/transporter by an estimated unit cost of remediating MSW at a representative RCRA Subtitle D landfill. This method provides a fair and efficient means by which EPA may settle with MSW generators/transporters that reflect a reasonable approximation of the cost of remediating MSW.

This policy's unit cost methodology is based on the costs of closure/post-closure activities at a representative RCRA Subtitle D landfill. EPA's estimate of the cost per unit of remediating MSW at a representative Subtitle D landfill is $5.30 per ton. [3] That unit cost is derived from the cost model used in EPA's "Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills," (RIA). [4]

To calculate the unit cost, the Subtitle D landfill cost model was applied to account for the costs associated with the closure/post-closure criteria of Part 258 [5] (excluding non-remedial costs, such as siting and operational activities) for two types of costs scenarios: basic closure cover requirements at a Subtitle D landfill; and closure requirements supplemented by a typical corrective action response at a Subtitle D landfill. Based on the costs associated with those activities, EPA developed a cost per ton for each scenario. In recognition of EPA's estimate that approximately 30-35% of existing unlined MSW landfills will trigger corrective action under Part 258, [6] EPA used a weighted average of both unit costs to develop a final unit cost. Specifically, EPA averaged the unit costs giving a 67.5% weight to the basic closure cover unit cost, and a 32.5% weight to the multilayer cover and corrective action scenario. The resulting unit cost, $5.30 per ton reflects (as stated in the Subtitle D RIA) is the likelihood that unlined MSW landfills, such as those typically found on the NPL, would trigger corrective action under

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[3] This rate will be adjusted over time to reflect inflation.

[4] PB-92-100-841 (EPA's Office of Solid Waste and Emergency Response); *see also* RIA Addendum, PB-92-100-858.

[5] Part 258 is the set of regulations that establish landfill operation and closure requirements for RCRA Subtitle D landfills.

[6] *See* Addendum to RIA at II-12 n. 13.

Part 258.

In applying the RIA model to develop unit costs, EPA used the average size of co-disposal sites on the NPL, 69 acres. Other landfill assumptions from the RIA that EPA used in running the model include the following: a 20-year operating life (also consistent with the average NPL co-disposal site operating life); 260 operating days per year; a below-grade thickness of 15 feet with 50 percent of waste below grade; a compacted waste density of 1,200 lb/cy;[7] and a landfill input of 289.3 tons per day.[8] The present value cost is calculated assuming a 7 percent discount rate.

When seeking to apply the unit cost to parties' MSW contributions, in some cases a party's contribution is quantified by volume (cubic yards) rather than weight (pounds). Absent site-specific contemporaneous density conversion factors, Regions may use the following presumptive conversion factors that are representative of MSW. MSW at the time of collection from places of generation (i.e., "loose" or "curbside" refuse) has a density conversion factor of 100 lbs./cu. yd.[9] MSW at the time of transport in or disposed by a compactor truck has a density conversion factor of 600 lbs./ cu. yd.[10] In cases involving municipal sewage sludge, a party's contribution may be first converted from a volumetric value to a wet weight value using a water density of 8.33 lbs./gallon[11] and the specific gravity of the municipal sewage sludge.[12] The wet weight may then may be converted to a dry weight using an appropriate value for the percentage of solids in the municipal sewage sludge. These conversion factors, in conjunction with the unit cost, can be used to develop a total settlement for the MSW attributable to an individual party.

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[7] September 22, 1997 memo to the file by Leslie Jones (conversation with Dr. Robert Kerner, Drexell University, head and founder of the Geosynthetic Institute).

[8] The RIA model calculates a ton per day input of 298.3 based on the 69-acre size, the waste density factor of 1200 lb. cy, and a total of 5200 operating days during the life of the landfill.

[9] Estimates of the Volume of MSW and Selected Components in Trash Cans and Landfills" (Feb. 1990), prepared for the Council for Solid Waste Solutions by Franklin Associates, Ltd.; "Basic Data: Solid Waste Amounts, Composition and Management Systems" (Oct. 1985 – Technical Bulletin #85-6), National Solid Waste Management Association.

[10] *Id.*

[11] "Final Guidance on Preparing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA" (Feb. 22, 1991), OSWER Directive No. 9835.16.

[12] Specific density is determined by dividing the density of a material by the density of water.

In order to be eligible for a settlement under this policy, an MSW generator/transporter must provide all information requested by EPA to estimate the quantity of MSW contributed by such a party. EPA may solicit information from other parties where appropriate to estimate the quantity of a particular generator's/transporter's contribution of MSW. Where the party has been forthcoming with requested information, but the information is nonetheless imperfect or incomplete, EPA will construct an estimate of the party's quantity incorporating reasonable assumptions based on relevant information, such as census data and national per capita solid waste generation information.

MSW generators/transporters settling pursuant to this policy will be required to waive their contribution claims against other parties at the site. In the situation where there is more than one generator or transporter associated with the same MSW, EPA will not seek multiple recovery of the unit cost rate from different generators or transporters with respect to the same units of MSW. EPA will settle with one or all such parties for the total amount of costs associated with the same waste based on the unit cost rate. Notwithstanding the general requirement that settlors under this policy must waive their contribution claims, a settlor will not be required to waive its contribution claims against any nonsettling non-de micromis generators or transporters associated with the same waste. However, in regards to these individual payments for the same MSW, EPA will not become involved in determining the respective shares for the parties.

It is an MSW generator's or transporter's responsibility to notify EPA of its desire to enter into settlement negotiations pursuant to this proposal. Absent the initiation of settlement discussions by an MSW, G/T, EPA may not take steps to pursue settlements with such parties.

Municipal Owner/Operator Settlements:

Pursuant to this policy, the U.S. will offer settlements to municipal owners/operators of co-disposal facilities who wish to settle; those municipal owners/operators who do not settle with EPA will remain subject to site claims by EPA consistent with the principles of joint and several liability, and claims by other parties.

EPA recognizes that some of the co-disposal landfills listed on the NPL are or were owned or operated by municipalities in connection with their governmental function to provide necessary sanitation and trash disposal services to residents and businesses. EPA believes that those factors, along with the nonprofit status of municipalities and the unique fiscal planning considerations that they face, warrant a national settlement policy that provides municipal owner/operators with settlements that are fair, reasonable, and in the public interest. As discussed below, EPA has based the policy on what municipalities have historically paid in settlements at such sites.

This policy establishes 20% of total estimated response costs for the site as a presumptive baseline settlement amount for an individual municipality to resolve its owner/operator liability at the site. Regions may offer settlements varying form this presumption consistent with this policy, generally not to exceed 35%, based on a number of site-specific factors. The 20%

baseline is an individual cost share and pertains solely to a municipal owner/operator's liability as an owner/operator. EPA recognizes that, at some sites, there may be multiple liable municipal owners/operators and EPA may determine that it is appropriate to settle for less than the presumption for an individual owner/operator. A group or coalition of two or more municipalities with the same nexus (i.e., basis for liability) to a site, operating at the same time or during continuous operations under municipal control, should be considered a single owner/operator for purposes of developing a cost share (e.g., two or more cities operated together in joint operations; in cost sharing agreements; or continuously where such a group's membership may have changed in part). In cases where a municipal owner/operator is also liable as an MSW generator/transporter, EPA may offer to resolve the latter liability for an additional payment developed pursuant to the MSW generator/transporter settlement methodology.

Under this policy, EPA may adjust the settlement in a particular case upward from the presumptive percentage (generally not to exceed a 35% share) based on consideration of the following factors:

(1) whether the municipality or an officer or employee of the municipality exacerbated environmental contamination or exposure (e.g., the municipality permitted the installation of drinking water wells in known areas of contaminations); and
(2) whether the owner/operator received operating revenues net of waste system operating costs during ownership or operation of the site that are substantially higher than the owner/operator's presumptive settlement amount pursuant to this policy.

The Regions may adjust the presumptive percentage downward based on whether the municipality, of its own volition (i.e., not pursuant to a judicial or administrative order) made specific efforts to mitigate environmental harm once that harm was evident (e.g., the municipality installed environmental control systems, such as gas control and leachate collection systems, where appropriate; the municipality discontinued accepting hazardous waste once groundwater contamination was discovered; etc.). The Regions may also consider other relevant equitable factors at the site.

The 20% baseline amount is based on several considerations. EPA examined the data from past settlements of CERCLA liability between the United States, or private parties, and municipal owners/operators at co-disposal sites on the NPL where there were also PRPs who were potentially liable for the disposal of non-MSW, such as industrial waste. EPA excluded from analysis sites where the municipal owner/operator was the only identified PRP because these are not the types of situations that this policy is intended to address. Thus, settlements under this policy are appropriate only at sites where there are multiple, viable non-de minimis non-MSW generator/transporters. EPA's analysis of past settlements indicated an average municipality settlement amount of 29% of site costs.

In reducing the 29% settlement average to a 20% presumptive settlement amount, EPA considered two primary factors. First, in examining the historical settlement data, EPA considered that the relevant historical settlements typically reflected resolution of the municipality's liability not only as an owner/operator, but also as a generator or transporter of MSW. Under this policy, a municipality's generator/transporter liability will be resolved

through payment of an additional amount, calculated pursuant to the MSW generator/transporter methodology.

Second, the owner/operator settlement amounts under this policy also reflect the requirement that municipal owner/operators that settle under this policy will be required to waive all contribution rights against other parties as a condition of settlement. By contrast, in many historical settlements, municipal owners/operators retained their contribution rights and hence were potentially able to seek recovery of part of the cost of their settlement from other parties.

V. APPLICATION

This policy applies to co-disposal sites on the NPL. This policy is intended for settlement purposes only, and, therefore, the formulas contained in this policy are relevant only where settlement occurs. In addition, this policy does not address claims for natural resource damages.

This policy does not apply to MSW generators/transporters who also generated or transported any non-MSW containing a hazardous substance, except to the extent that a party can demonstrate to EPA's satisfaction the relative amounts of MSW and non-MSW it disposed of at the site and the composition of the non-MSW. In such cases, EPA may offer to resolve the party's liability with respect to MSW as provided in this policy at such time as the party also agrees to an appropriate settlement relating to its non-MSW on terms and conditions acceptable to EPA.

EPA does not intend to reopen settlements with the U.S., nor does this policy have any effect on unilateral administrative orders (UAOs) issued prior to issuance of the policy. At sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, the U.S. may settle with eligible parties based on the formulas established in this policy and may place those settlement funds in a site-specific special account. At sites where no parties have settled to perform work, where the U.S. is seeking to recover costs from private parties, and where the private parties have initiated contribution actions against municipalities and other MSW generators/transporters, the U.S. will seek to apply the most expeditious methods available to resolve liability for those parties pursued in third-party litigation, including, in appropriate circumstances, application of this policy. EPA may require settling parties to perform work under appropriate circumstances, in a manner consistent with the settlement amounts provided in this policy.

Because one of the goals of this policy is to settle for a fair share from MSW generators/transporters and municipal owners/operators, EPA will consider in determining a settlement amount under this policy any claims, settlements or judgements for contribution by a party seeking settlement pursuant to this policy. In no circumstances should a party that receives monies from contribution settlements in excess of its actual cleanup costs receive a benefit from this policy.

The United States will not apply this policy where, under the circumstances of the case, the resulting settlement would not be fair, reasonable, or in the public interest. Regions should carefully consider and address any public comments on a proposed settlement that questions the settlement's fairness, reasonableness, or consistency with the statute.

VI. FINANCIAL CONSIDERATIONS IN SETTLEMENTS

In cases under this policy, EPA will consider all claims of limited ability to pay. EPA intends in the future to develop guidelines regarding analysis of municipal ability to pay. Parties making such claims are required to provide EPA with documentation deemed necessary by EPA relating to the claim, including potential or actual recovery of insurance proceeds. Recognizing that municipal owners/operators often are uniquely situated to perform in-kind services at a site (e.g., mowing, road maintenance, structural maintenance), EPA will carefully consider any forms of in-kind services that a municipal owner/operator may offer as partial settlement of its cost share.

VII. USE WITH OTHER POLICIES

This policy is intended to be used in concert with EPA's existing guidance documents and policies (e.g., orphan share, de micromis, residential homeowner, etc.), and so other EPA settlement policies may also apply to these sites. For example, those parties eligible for orphan share compensations under EPA's orphan share policy will continue to be eligible for such compensation.[13]

VIII. CONSULTATION REQUIREMENT

The first two settlements in each Region reached pursuant to this policy require the concurrence of the Director of the Office of Site Remediation Enforcement (OSRE). All subsequent settlements with municipal owners/operators at co-disposal require the concurrence of the Director of OSRE.

If you have any questions regarding this policy please call Leslie Jones (202) 564-5123 or Doug Dixon (202) 564-4232.

NOTICE; This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This guidance is not a rule and does not create any legal obligations. Whether and how the United States applies the guidance to any particular site will depend on the facts at the site.

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[13] The orphan share policy will continue, however, to apply towards total site costs and not an individual settlor's settlement share.

City of Deer Park ADR Questionnaire Responses

12. a. City of Deer Park
4250 Matson Avenue
Deer Park, Ohio 45236

b. Late-June, 1957 through July 1957
July 28, 1957
August 1, 1957
December 2, 1957
January 9, 1958
December 20, 1958
April 2, 1959
April 22, 1959
July 1, 1959
September 1, 1959
November 12, 1959
March 9, 1960
May 11, 1960
June 7, 1960
August 8, 1960

c. Late-June, 1957 through July, 1957: Source - City of Deer Park City Council Minutes
July 28, 1957: Source - Nexus Materials
August 1, 1957: Source - Nexus Materials
December 2, 1957: Source - Nexus Materials
January 9, 1958: Source - Nexus Materials
December 20, 1958: Source - Nexus Materials
April 2, 1959: Source - Nexus Materials
April 22, 1959: Source - Nexus Materials
July 1, 1959: Source - Nexus Materials
September 1, 1959: Source - Nexus Materials
November 12, 1959: Source - Nexus Materials
March 9, 1960: Source - Nexus Materials
May 11, 1960: Source - Nexus Materials
June 7, 1960: Source - Nexus Materials
August 8, 1960: Source - Nexus Materials

13. a. For all the above time periods, the type of transported material was municipal solid waste collected from residential and commercial entities within the City of Deer Park. Chemical constituents unknown; however, an interview with J. Henry Camp (previous Service Director for the City of Deer Park from the later 1950s through the mid 1970s) indicates that there were no heavy industries located

within the City's jurisdiction.

b. For all the above time periods, this material was produced by residential and commercial solid waste generation.

c. See response to question 12.b for the frequency of transport to the Site. An interview with J. Henry Camp (previous Service Director for the City of Deer Park) indicated that the City of Deer Park only used the Site on an emergency basis from 1957 through 1960. This was verified by David O'Leary who had prior conversations with Bill Geist (deceased previous Service Department employee from 1946 through 1989). This is consistent with the sporadic entries in the Nexus materials. The response to question 12.b. also indicates that Deer Park used the Site from late-June 1957 through July 1957 as a primary disposal site. This time frame corresponds with the July 28, 1957 Skinner log entry for $20.00 and the August 1, 1957 Skinner log entry for $172.00 (total for the five-week period = $192.00). The $192.00 figure is comparable to what the City of Deer Park was paying to its primary landfill on a five week basis before its primary landfill closed sometime in June 1957. The interview with J. Henry Camp also indicated that Deer Park began to transport its waste to Clarke Incinerator soon after its primary landfill closed sometime in June 1957. Consequently, this information, in conjunction with the Skinner log entries and Deer Park Council minutes, leads to the conclusion that Deer Park's primary landfill closed some time in June 1957. As a temporary measure, Deer Park used the Site as its primary dump location for approximately five weeks (late-June 1957 through July 1957). After July 1957, Deer Park began transporting its municipal solid waste to the Clarke Incinerator.

d. This information is unknown. As required by the Questionnaire's instructions, the following represents a "good faith estimate or approximation."

A 1961 draft contract between the City of Deer Park and another landfill (see "Confidential materials") states that the monthly fee paid by the City of Deer Park to the landfill operator is "based on an average of 20 to 22 loads per week . . .[approximately] at the rate of $4.20 (Four Dollars and Twenty Cents) per load." Taking into consideration the City of Deer Park's growth between 1957 and 1961, an estimate of the average number of loads per week from 1957 through 1960 would be 18.

In the years 1957 through 1960, the City hauled municipal and commercial solid waste with a thirteen (13) yard load packer (compacted waste) and an open bed dump truck (non-compacted waste). It is not known which vehicle transported the material to the Site. In all likelihood, both vehicles were used to transport waste to the Site. A "good faith estimate or approximation" of the municipal solid waste

tonnage hauled in a full thirteen yard loader is 3.6 tons and a "good faith estimate or approximation" of the municipal solid waste tonnage hauled an the open bed dump truck is 0.35 tons.[1]

Assuming all the waste (18 loads per week) that was shipped to the Site during late-June 1957 through July 1957 (approximately five weeks) was shipped using the thirteen yard load packer, then approximately 90 loads of material were deposited at the Site from late-June 1957 through July 1957. At 3.6 tons per load, this would total 324 tons.

Assuming all the waste (18 loads per week) that was shipped to the Site during late-June, 1957 through July, 1957 (approximately five weeks) was shipped using an open bed dump truck, then approximately 90 loads of material were deposited at the site from late-June, 1957 through July, 1957. At 0.35 tons per load, this would total 31.5 tons.

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[1] ***Tonnage Calculation for 13 yard load packer***

Volume per truck: 13 cubic yards of compacted waste material

U.S. EPA volume/mass conversion factor: 550 lbs/cubic yds. (see U.S. EPA Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal)

Pounds per truck: 13 cubic yds * 550 lbs/cubic yds. = 7,150 lbs per truck

Tons per truck: 7,150 lbs/truck * 1 ton/2,000 lbs = **3.6 tons/truck**

Tonnage Calculation for open bed dump truck (non-compacted)

Volume per truck: 7 cubic yds. (Good faith estimate based upon conversations with David O'Leary)

U.S. EPA volume/mass conversion factor: 100 lbs/ cubic yds. (see U.S. EPA Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal)

Pounds per truck: 7 cubic yds. * 100 lbs/cubic yds. = 700 lbs per truck

Tons per truck: 700 lbs/truck * 1 ton/2,000 lbs = **0.35 tons/truck**

In all likelihood, both the open bed dump truck and the thirteen yard load packer were used to transport material to the site. Assuming that each truck was used for half of the total number of loads, then the total approximate tonnage delivered to the Site from late-June, 1957 through July, 1957 would be 178 tons (45 loads * 0.35 tons/load = 16 tons and 45 loads * 3.6 tons/load = 162 tons; 16 tons + 162 tons = 178 tons).

Presumably, the City of Deer Park's $20.00 and $172.00 payments for the July 28, 1957 and the August 1, 1957 log book entries covered the fees for the 178 tons generated during this five week period. This equates to approximately $1.08/ton ($192.00/178 tons = $1.08).

Assuming that Skinner charged the City of Deer Park $1.08/ton (increasing $0.05 per year for inflation), then the amounts of material deposited based upon the remaining entries in the Skinner log book (other than the July 28, 1957 entry for $20.00 and the August 1, 1957 entry for $172.00) would be as follows:

December 2, 1957:	$22.00/1.08 = 20 tons
January 9, 1958:	$12.00/1.13 = 11 tons
December 20, 1958:	$28.00/1.13 = 32 tons
April 2, 1959:	$12.00/1.18 = 10 tons
April 22, 1959:	$18.00/1.18 = 15 tons
July 1, 1959:	$40.20/1.18 = 34 tons
September 1, 1959:	$28.00/1.18 = 24 tons
November 12, 1959:	$18.00/1.18 = 15 tons
March 9, 1960:	$42.00/1.23 = 34 tons
May 11, 1960:	$08.00/1.23 = 7 tons
June 7, 1960:	$36.00/1.23 = 29 tons
August 8, 1960:	$56.00/1.23 = 46 tons
TOTAL:	277 tons

OVERALL TOTAL (277 tons + 178 tons) = 455 tons

e. Since this material was municipal and commercial solid waste, the material was removed from garbage cans or other containers and placed into either the thirteen yard load packer or the open bed truck.

f. The City of Deer Park used one thirteen yard load packer and one open bed dump truck to collect municipal trash. The estimated capacity of the thirteen yard load packer is 3.6 tons, and the estimated capacity of the open bed dump truck is 0.35 tons. (See footnote 1, supra, for the basis of these estimates.)

g. Unknown. The following represents a "good faith estimate or approximation" of the disposal price: (See response to part d. of this question for the rationale behind this "good faith estimate or approximation.")

1957 - $1.08/ton

1958 - $1.13/ton

1959 - $1.18/ton

1960 - $1.23/ton

h. The following sources of information were used:

1. Minutes from the City of Deer Park Council Meetings

2. Ordinances adopted by the City of Deer Park Council

3. Phone conversations with J. Henry Camp, former Safety-Service Director (late 1950s through mid-1970s)

4. Dave O'Leary, current Safety-Service Director

5. U.S. EPA Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal. (Attached as Exh. 1.)

14. a. Rumpke Waste, Inc. 1985 through December 31, 1990

Clarke Incinerator, Co. 1977 through 1984

b. 13.a. For the above time periods, the type of transported material was municipal solid waste collected from residential and commercial entities within the City of Deer Park. Chemical constituents unknown; however, interviews with J. Henry Camp and David O'Leary (past and current Safety-Service Directors respectively for the City of Deer Park) indicate that there were no heavy industries located within the City's jurisdiction during the foregoing time periods.

13.b. For all the above time periods, this material was produced by residential and commercial solid waste generation.

13.c. ***Rumpke Waste, Inc.***: Rumpke Waste, Inc. provided curbside pick up once

per week for all residents located within the city of Deer Park. The City of Deer Park's contract with Rumpke required Rumpke to use its own sanitary landfill as the as the primary disposal destination for the City's waste.

Clarke Incinerator, Inc.: The City of Deer Park would provide curbside pick up once per week for all residents and commercial businesses located within the City of Deer Park. When full, the City's trucks would take the materials to Clarke Incinerator, Inc.

13.d. ***Rumpke Waste, Inc.***:

Based on conversations with Rumpke Waste, Inc., Dave O'Leary estimated that the average tonnage of landfilled municipal solid waste which the City of Deer Park has generated since it began using Rumpke is approximately 185 tons/month (approximately 40 additional tons is recycled each month for a total generation rate of 225 tons/month).

185 tons/month * 72 months = 13,320 tons which represents a "good faith estimate or approximation" of the total transported by Rumpke Waste, Inc. from 1985 through 1990.

Clarke Incinerator, Inc.:

Based on conversations with Dave O'Leary, current Safety-Service Director for the City of Deer Park), the City of Deer Park's population from 1977 through 1984 was approximately the same as it is today. Assuming that each City resident generated 20% less solid waste during this time period than they do today (based on assumption that disposable consumer products significantly and continuously increased during the last fifteen years), then the amount of municipal solid waste transported to Clarke Incinerator, Inc. from 1977 through 1984 would have been:

225 tons/month * 0.80 = 180 tons/month

180 tons/month * 96 months = 17,280 tons (this represents a "good faith estimate or approximation" of the total amount of material transported by the City of Deer Park to Clarke Incinerator, Inc. from 1977 through 1984.

13.e. For all the above time periods, since this material was municipal and commercial solid waste, the material was removed from garbage cans or containers and placed into the appropriate garbage truck.

13.f. ***Rumpke Waste, Inc.***: Rumpke Waste, Inc. used ten-ton trucks to collect and transport the City of Deer Park's municipal solid waste. The number of trucks used per month would have been approximately 19 (185 tons/month * 1 truck/10 tons = 19 trucks/month).

Clarke Incinerator, Inc.: The City of Deer Park used two sixteen-yard load packers to collect municipal trash. The estimated capacity of a sixteen-yard load packer is 4.4 tons.

16 cubic yds. * 550 lbs/1 cubic yd. * 1 ton/2,000 lbs = 4.4 tons

13.g. ***Rumpke Waste, Inc.***:

1985: unknown

1986: unknown

1987: unknown

1988: $3.248 per residential unit each month for both transport and disposal

1989: $3.248 per residential unit each month for both transport and disposal

1990: $3.248 per residential unit each month for both transport and disposal

Clarke Incinerator, Inc.:

1977: $1.25/cubic yd. of municipal solid waste; $5.50/load of brush

1978: $1.40/cubic yd. of municipal solid waste; 47.00 cubic yd. of brush

1979: unknown

1980: $1.80 cubic yd. of municipal solid waste

1981 through 1984: unknown

13.h. The following sources of information were used:

1. Minutes from the City of Deer Park Council Meetings

2. Ordinances adopted by the City of Deer Park Council

3. Phone conversations with J. Henry Camp, former Safety-Service Director and Dave O'Leary, current Safety-Service Director.

4. Contract with Rumpke Waste, Inc.

5. Contracts with Clarke Incinerator, Inc.

15. After completing our "full and thorough investigation," it is believed that there were no commercial establishments occupying over 20,000 square feet of space or industrial establishments within the City of Deer Park.

16. a. Minutes from numerous City of Deer Park Council meetings, contracts with other landfills, and interviews with persons currently and previously employed by the City of Deer Park provide the basis for the conclusion that the City of Deer Park transported or arranged for the transport or disposal of material to locations other than the site. (See Confidential documents.)

b. 1930 - 1957: Municipal solid waste dumped at other locations (See Confidential documents.)

1957 - 1960: Municipal solid waste dumped at Site on emergency basis only. All other municipal solid waste dumped at other locations.(See Confidential documents.)

1961 - 1990: Municipal solid waste dumped at other locations. (See Confidential documents.)

c. 1930 - 1984: Municipal solid waste transported by the City of Deer Park

1985 - 1990: Municipal solid waste transported by Rumpke Waste, Inc.

17. There were no sewage or wastewater treatment plants in the City of Deer Park during the relevant time period.

18. Responsive documents provided in the enclosed Redwell folder. (see Confidential materials also)

19. Responsive documents provided in the enclosed Redwell folder. (see Confidential materials also)

20. See list of all City officials and Service Department employees attached as Exh.2.

27 a. Persons interviewed who have relevant information:

Dave O'Leary (current Safety-Service Director)

J. Henry Camp (former Safety-Service Director)

Harvey Alcorn (Councilmember)

b. Persons who may have relevant information but were not interviewed:

Bill Geist Deceased

c. All documents which may be relevant but which were not reviewed:

Canceled checks
Previous contracts
Proposals for garbage collection
Personal notes

All of the above have been destroyed in accordance with the City of Deer Park's document retention policy.

28. **Factual Defenses**

The sporadic entries in the Skinner log book for the City of Deer Park are limited to the years 1957 through 1960. J. Henry Camp, the City of Deer Park's Safety-Service Director from the late 1950s through most of the 1970s, stated that the City of Deer Park only used the Site on an emergency basis. This explanation of the sporadic entries was also confirmed by David O'Leary's (current Safety-Service Director) interviews with Bill Geist who was a Deer Park Service Department employee from 1946 through 1989. This information, when combined with the results of the "full and thorough investigation," lead to the conclusion that the City of Deer Park was not a major contributor of material to the Site.

Legal Defenses

No Joint and Several Liability

Pursuant to *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist. LEXIS (S.D. Ohio March 18, 1996)(attached as Exh. 3), Potentially Responsible Parties ("PRPs") under the Comprehensive Environmental

Response Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("SARA"), may not bring a claim upon which relief can be granted under 42 U.S.C. § 9607(a), CERCLA § 107(a). *AT&T Global Info. Solutions Co.*, which is the controlling authority for this action pending before the United States District Court for the Southern District of Ohio, after fully expounding upon the distinctions between the joint and several liability among responsible parties falling within 42 U.S.C. § 9607(a), CERCLA § 107(a) and that of 42 U.S.C. § 9613(f), CERCLA § 113(f), which would limit a responsible plaintiff's claim solely to that of a contribution recovery, held:

> [T]he Court concludes that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all for all expenses incurred in the cleanup, but are limited to contribution recovery.

Id. at *38 (citations omitted)(Exh. 3).

Ensuring that its holding would remain clear and unambiguous, over a year later the *AT&T Global Info. Solutions Co.* Court reiterated its March 18, 1996 holding in a March 31, 1997 Memorandum and Order:

> Plaintiffs initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that plaintiffs should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1). Defendants also moved to dismiss plaintiffs' claims for attorney's fees and for reimbursement of governmental oversight costs. In a related motion, plaintiffs moved to dismiss defendants' counterclaims for contribution.
>
> By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. ***The Court held that plaintiffs, as potentially responsible parties, were not***

entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup.

AT&T Global Info. Solutions Co. v. Union Tank Car Co., No. 2:94-876, 1997 WL 382101 at *1 (S.D. Ohio March 31, 1997)(attached as Exh. 4).

Importance of Toxicity

The degree of toxicity of the particular waste attributed to each responsible party is a primary consideration among the"Gore Factors" or other equitable factors considered under 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1) for allocating contribution costs among responsible parties. As such, the degree of toxicity should be heavily weighted to a much greater degree than other equitable factors, such as volume, when apportioning costs to the responsible parties. *See, e.g., Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995), stating in pertinent part:

> A primary focus of these factors is the harm that each party causes the environment. Those parties who can show that their contribution to the harm is relatively small in terms of amount of waste, toxicity of the waste, involvement with the waste, and care, stand in a better position to be allocated a smaller portion of response costs.

Id. at 935 (citations omitted).

> CERCLA, in the allocation stage, places the costs of response on those responsible for creating the hazardous condition. Allocating responsibility based partially on toxicity does just that because those who release substances that are more toxic are more responsible for the hazardous condition.

Id. at 938. *See also, Catellus Dev. Corp. v. L. D. Mcfarland Co.*, 910 F. Supp. 1509, 1514 (D. Oregon 1995)(following the *Control Data Corp.* Court's reasoning in heavily weighing toxicity as an equitable allocation factor); *BancAmerica Comm'l Corp. v. Trinity Indus., Inc.*, 900 F. Supp 1427, 1474 (D. Kansas 1995)(following *Control Data Corp.* and noting that "[t]his court agrees with the reasoning in *Control Data* and finds it equitable to adopt the approach taken in that case which allocated one-third

of response costs to a party that had contributed only 10% of the total volume of pollution.")

In cases where particular municipal solid waste is found to contain hazardous substances, thereby subjecting the municipality to potential liability under 42 U.S.C. § 9613(f), CERCLA § 113(f) as a potential responsible party, such waste has an extremely low degree of toxicity. Therefore, in such cases, the low level of toxicity is a primary consideration under the "Gore Factors" or other equitable factors pursuant to 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1), and must weigh heavily in favor of a significantly lower allocation in relation to the other non-municipal responsible parties.

The fact that municipal solid waste is of extremely low toxicity is reflected in and is the basis of the U.S. EPA's Interim Municipal Settlement Policy issued nearly eight years ago on December 12, 1989. 54 Fed. Reg. 51071(1989). In this regard the interim policy states:

> Although the actual composition of such wastes varies considerably at individual sites, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and ***may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.***

Id. at 51074.

29. With respect to municipalities such as Deer Park, an equitable and fair allocation of liability should be based upon the U.S. EPA's Municipal Solid Waste Settlement Proposal (hereafter "Proposal")(see Exh. 1 for the "Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal.") The public comment period for this Proposal ended August 25, 1997, and it appears that the Proposal will be promulgated in substantially the same form as a final policy in the near future. This Proposal describes a rational methodology for calculating "appropriate settlement contributions for . . . generators/transporters (G/Ts) of . . . municipal solid waste. . . The purpose of this proposal is to provide a fair, consistent, and efficient settlement methodology for resolving potential liability of . . . [municipal solid waste generators and transporters] at co-disposal Superfund sites." (Exh. 1 at 1.) This Proposal is specifically targeted to help municipalities such as Deer Park, as the U.S. EPA recognizes that "PRPs that contributed large quantities of hazardous substances at co-disposal landfills have

sometimes sought to spread the cost of their CERCLA liability among large numbers of other parties, including those whose only contribution was [municipal solid waste]." Id. at 2. In addition, "[a]t sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, EPA will recommend that the principles set forth in the final policy be followed by the private litigants to reach a settlement involving the MSW parties." Id. at 4.

The Proposal is based upon a unit cost methodology for the closure/post-closure activities at a RCRA Subtitle D landfill. Id. at 5. "EPA's estimate of the cost per unit of remediating [municipal solid waste] at a representative MSW-only landfill is $3.05 per ton." Id. The $3.05 per ton figure may rise to $3.25 if certain geologic factors exist (e.g., shallow aquifer beneath the landfill, or unusually high rainfall in the area). Id.

Based upon this Proposal, Deer Park's contribution to the cleanup of the Skinner Landfill Site would be calculated as follows:

Total tonnage sent to Site: 455 tons * $3.05/ton = $1,387.75

30. No response

31. No response

32. John C. Murdock Esq. or Jeffrey S. Goldenberg, Esq.
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Tel: (513) 345-8291
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CERTIFICATION

On behalf of the City of Deer Park (the "Participant"), I hereby certify that the Participant has conducted a full and thorough investigation to acquire all information necessary to respond to the foregoing questions and that the answers to all of the foregoing questions are given in good faith and are truthful, accurate, and complete to the best of my knowledge and belief. I further certify that to the best of my knowledge and belief, the Participant has not withheld any information which might contradict or cast significant doubt upon the foregoing answers. I further certify that if the Participant becomes aware of any information or documents that indicate that a response to this questionnaire was incomplete or incorrect at any time during the allocation process, the Participant will supplement its initial response to reflect the additional documents or information of which the Participant subsequently becomes aware. Finally, I certify that I am authorized to sign this Certification on the Participant's behalf.

David Kleuz by Jeff Goldenberg
Name

Safety - Service Director
Title

October 9, 1997
Date

O:\CLI\17121\4353\MISC\4353KSB.07C

Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal

SUMMARY: EPA is publishing the "Municipal Solid Waste Settlement Proposal" to inform the public about this proposal and to solicit public comment before developing a final policy. This proposal describes a methodology for calculating appropriate settlement contributions for municipal owner/operators (O/Os) and municipal and other generators/transporters (G/Ts) of municipal sewage sludge and municipal solid waste (collectively referred to as MSW) at co-disposal landfills under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §9601 et seq. The purpose of this proposal is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability of municipal O/Os and MSW G/Ts at co-disposal Superfund sites. Specifically, EPA is proposing settlements based upon a unit cost formula for contributions by MSW G/Ts and a settlement range, based on historical data, for municipal O/Os of co-disposal sites.

DATE: Comments must be submitted no later than 45 days after publication of this proposal.

ADDRESS: Comments should be addressed to Leslie Jones, U.S. Environmental Protection Agency, Office of Site Remediation Enforcement, Policy and Guidance Branch (2273A), 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Leslie Jones, phone: (202) 564-5144; fax: (202) 564-0091.

EPA Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites

BACKGROUND

Currently, there are approximately 250 landfills on the National Priorities List (NPL) that accepted both municipal solid waste (MSW) and other wastes, such as industrial wastes, containing hazardous substances (commonly referred to as "co-disposal" landfills). Co-disposal landfills comprise approximately 23% of the sites on the NPL. Many of these landfills are or were owned or operated by municipalities in connection with their obligation to provide necessary sanitation and trash disposal services to residents and businesses. The number of co-disposal sites on the NPL, and the problems associated with co-disposal of MSW and industrial wastes, have prompted EPA to address issues facing municipal owner/operators (O/Os) and MSW generators/transporters (G/Ts) at Superfund sites.

For the purposes of this proposal, EPA defines municipal solid waste as solid waste that is generated primarily by households, but that may include some contribution of wastes from commercial, institutional and industrial sources as well. Although the actual composition of such wastes varies considerably at individual sites, municipal solid waste is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents), as well as conditionally exempt small quantity generator wastes (i.e., a listed or characteristic

waste under RCRA that is exempt from permitting because it is accumulated in quantities of less than 100 kilograms (kg)/month for hazardous waste and less than 1 kg/month for acute hazardous waste, 40 C.F.R. § 261.5).

Sewage sludge is defined as any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sludge. For purposes of this proposal, municipal solid waste and municipal sewage sludge are collectively referred to as MSW; all other wastes and substances are referred to as non-MSW. The term municipality refers to any political subdivision of a state and may include a city, county, town, township, local public school district or other local government entity.

On December 12, 1989, EPA issued the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (the "1989 Policy") to establish a consistent approach to certain issues facing MSW G/Ts and municipalities. The 1989 Policy assists EPA in determining whether to exercise its enforcement discretion to pursue MSW G/Ts as potentially responsible parties (PRPs) under Section 107(a) of CERCLA. The 1989 Policy provides that EPA generally will not identify an MSW G/T as a PRP for the disposal of MSW at a site unless there is site-specific evidence that the MSW contained hazardous substances derived from a commercial, institutional or industrial process or activity. The 1989 Policy recognizes that, like private parties, municipal O/Os may be PRPs at Superfund sites. The 1989 Policy identified several settlement provisions, however, that may be particularly suitable for settlements with municipal O/Os in light of their status as governmental entities.

Notwithstanding EPA's 1989 Policy, MSW G/Ts have sometimes been drawn into CERCLA contribution litigation. PRPs that contributed large quantities of hazardous substances at co-disposal landfills have sometimes sought to spread the cost of their CERCLA liability among large numbers of other parties, including those whose only contribution was MSW.

Numerous studies have demonstrated that hazardous substances are typically present in MSW in very low concentrations. The overwhelming majority of landfills at which MSW alone was disposed do not experience environmental problems of sufficient magnitude to merit designation as Superfund Sites. In the Agency's experience, with only the rarest of exceptions, MSW landfills do not become Superfund Sites unless other types of wastes containing hazardous substances, such as industrial wastes, are co-disposed at the facility.

In addition, the cost of remediating MSW is typically much lower than the cost of remediating industrial waste. In 1992, EPA performed a comparative analysis of the cost of remediating a representative MSW site versus the cost of remediating a representative industrial waste site. At that time, EPA found that on a per-acre basis, the estimated cost of remediating MSW was significantly lower than the cost of remediating industrial waste. Although costs have changed somewhat since 1992 and EPA continues to learn more about remediating different kinds of waste sites, the Agency does not believe that there has been a radical shift in the relative cost of remediating MSW versus industrial wastes.

INTRODUCTION AND APPLICATION

This proposal will provide revised national guidance on how to involve MSW G/Ts in the CERCLA settlement process and more detailed guidelines for Agency settlements with municipal O/Os. This proposal applies to municipal O/Os and to municipal and private MSW G/Ts. This proposal encourages settlements by setting forth a fair and efficient method for calculating an equitable and reasonable settlement contribution for such parties. Such settlements should encourage settlements with and reduce transactions costs for all parties at a site and should reduce third-party litigation. Specifically, this proposal contains a unit cost formula for contributions by MSW G/Ts and a presumptive settlement percentage and range, based on historical data, for municipal O/Os of co-disposal sites. In addition, a final policy will provide guidelines for evaluating a municipality's ability to pay.

This proposal builds on the 1989 Policy with respect to generators and transporters of MSW. The Agency will continue its policy of not identifying such parties as PRPs at Superfund Sites. As in the 1989 Policy, this proposal does not apply if there is site-specific evidence that the MSW contained hazardous substances derived from a commercial, institutional or industrial process or activity. In recognition of the strong public interest in reducing the burden of contribution litigation, however, EPA is proposing to supplement the 1989 policy by offering settlements to any such MSW G/Ts that wish to resolve their potential Superfund liability and to obtain contribution protection pursuant to Section 113(f) of CERCLA.

This proposal does not apply to MSW G/Ts who also generated or transported any non-MSW containing a hazardous substance, except to the extent that a party can demonstrate that the MSW was completely and continually segregated from the non-MSW prior to and during disposal at the site. Such a party would be required to demonstrate to EPA's satisfaction that segregation occurred. In considering claims of segregated waste, EPA will consider whether the MSW and non-MSW were delivered to the site in separate loads and/or separate packaging, disposed of in separate units of the landfill, handled, packaged and disposed of separately within the disposing facility, and other relevant information. Where such segregation of waste is demonstrated, this proposal applies only to the MSW component of that waste stream; the party's liability for non-MSW would continue to be addressed under applicable EPA CERCLA policies (e.g., EPA's de minimis policy).

To address concerns that this proposal may result in the indirect inclusion in contribution litigation of MSW parties who have contributed small amounts of MSW, and in an effort to prevent creation of transaction costs for parties that EPA has tried to protect from lawsuits through the de micromis policy, EPA intends to amend the existing de micromis policy to modify the volumetric cut-off for MSW G/Ts.

This proposal is designed for co-disposal sites on the NPL. Co-disposal sites contain both MSW and non-MSW. Although this proposal has its most direct application at co-disposal sites with multiple, viable non-de minimis G/Ts, EPA may elect to apply all or part of a final policy to other appropriate sites. Because this proposal is a draft and is subject to public comment before finalization, EPA will not apply it until the proposal is issued as a final policy.

EPA does not intend in any circumstances to reopen settlements already entered into or to reconsider Unilateral Administrative Orders (UAOs) issued prior to issuance of this policy. At sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, EPA will recommend that the principles set forth in the final policy be followed by the private litigants to reach a settlement involving the MSW parties. To the extent that such a settlement is not reached, the U.S. may settle with MSW G/Ts based on the formulas established in this proposal and place those settlement funds in a site-specific special account. At sites where no parties have settled to perform work, where the U.S. is seeking to recover costs from private parties, and where the private parties have initiated contribution actions against municipalities and other MSW G/Ts, the U.S. will seek to apply the most expeditious methods available to resolve liability for those parties pursued in third-party litigation, including, in appropriate circumstances, application of this proposal. In no circumstances does EPA intend to bestow a benefit on recalcitrant parties.

This proposal is intended for settlement purposes only and, therefore, the formulas contained in this proposal are relevant only where settlement occurs. Except as specifically provided below, this proposal will not supersede any of EPA's existing policies (e.g., orphan share, residential homeowner, etc.), and is intended to be used in concert with those policies. For example, those parties eligible for orphan share compensation under EPA's orphan share policy will continue to be eligible for such compensation.

PROCEDURE

EPA believes that this proposal can promote global settlements at co-disposal sites. In some cases, site circumstances may warrant a series of settlement negotiations with different parties. Because this proposal is designed to achieve fair and equitable settlements, settlements with the U.S. will generally provide contribution protection for settling parties and require parties settling under this proposal to waive contribution claims against all other PRPs at the site. In addition, the U.S. will accept settlements from parties based on limited ability to pay, where appropriate. Where beneficial to settling parties, the U.S. will place the proceeds of settlements under this proposal into a special account to help fund cleanup at the site.

MSW Generator/Transporter Settlements:

One purpose of this proposal is to facilitate settlements with MSW G/Ts who seek settlements with the U.S. This proposal recognizes the differences between MSW and the types of wastes that typically give rise to the environmental problems at Superfund Sites. Consistent with the 1989 Policy, EPA will generally not actively pursue MSW G/Ts absent site-specific evidence that the MSW contained a hazardous substance derived from a commercial, institutional or industrial process or activity. However, in recognition of the fact that the potential for small amounts of hazardous substances in MSW may result in contribution claims against MSW G/Ts, EPA intends to use its enforcement discretion to offer settlements based on the process and formulas contained in this proposal to parties that have not been issued special notice letters but that wish to enter settlement negotiations with EPA. It will be incumbent upon such parties to notify EPA of their desire to enter into settlement negotiations pursuant to this

proposal. Absent the initiation of settlement discussions by an MSW G/T, EPA may not take steps to pursue settlements with these parties.

Proposed G/T Methodology:

EPA's proposed methodology for calculating settlement offers to MSW G/Ts requires multiplying the known or estimated quantity of MSW contributed by the G/T by an estimated unit cost of remediating MSW at a representative MSW-only landfill. This method provides a fair, reasonable and efficient means of completing settlements with MSW G/Ts that reflects a reasonable approximation of the cost of remediating MSW.

The unit cost methodology is based on the costs of closure/post-closure activities at a "clean" MSW landfill (i.e., a RCRA Subtitle D landfill, not subject to RCRA corrective action or CERCLA response authorities) and increased slightly if certain site conditions exist. EPA's estimate of the cost per unit of remediating MSW at a representative MSW-only landfill is $3.05 per ton.[1] That unit cost is derived from the cost model in EPA's "Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills," (RIA) and then adjusted to reflect 1997 dollars. The Subtitle D landfill cost model was run to extract only the costs associated with closure/post-closure activities (thus excluding siting and operational costs). The closure criteria specified in the Solid Waste Disposal Facility Criteria (40 C.F.R. pt. 257 - 258) include a final cover system that minimizes erosion and infiltration with an erosion layer underlain by an infiltration layer. Post-closure requirements consist of cover maintenance, maintenance and operation of a leachate collection system, groundwater monitoring, and maintenance and operation of a gas monitoring system, all to be conducted for 30 years.

Of the Subtitle D landfill types addressed in the RIA, EPA selected the type most representative of the landfills encountered within the Superfund program: a closed, unlined, 55.53-acre landfill. Regions may increase the unit cost not to exceed $3.25/ton if the presence of one or more of the following factors exist:

- shallow aquifer beneath the landfill
- unusually high annual rainfall in the area
- cold ambient air temperature in the area
- affected groundwater beneath the site is classified as drinking water
- low-permeability cover material (e.g., clay) is unavailable onsite.

The presence of one or more of these factors may result in greater closure/post-closure costs at any MSW-only landfill due to the additional precautionary and monitoring technology generally utilized in those instances.

In the instance where a party's contribution is known in cubic yards rather than tons, the following density conversion scales should be used to convert the site-specific cubic yard data into tons:
(1) loose refuse ("curbside") - 100 lbs./cu. yd.;

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[1] This cost will be adjusted over time to reflect inflation.

(2) refuse in a compactor truck - 550 lbs./cu. yd; and
(3) refuse in a landfill (after degradation and settling) - 1200 lbs/cu. yd.[2]
In the instance where a party's contribution is MSS, Regions should use a conversion formula of 8.33 pounds/gallon.[3]

In order to use such density conversions, Regions should first identify whether the MSW cubic yard "waste-in" data represents MSW at the time of collection from places of generation, or MSW at the time of transport in or disposal by a compactor truck. Next, Regions should convert the cubic yards to pounds (tons) by multiplying either 100 (for curbside MSW) or 550 (for compactor truck MSW) times the number of cubic yards that a G/T contributed. For cases where site-specific conversion information is already available, Regions may use those conversions rather than the presumptive conversion scales provided in this proposal.

Once the adjusted unit cost is established, the Region will multiply that cost/ton by an individual G/T's quantity contribution to produce a total settlement amount for that party. In order to be eligible for settlements under this proposal, an MSW G/T must provide all information requested by EPA to estimate the quantity of MSW contributed by such party. EPA may solicit information from other parties where appropriate to estimate the quantity of a particular G/T's contribution of MSW. Where the party has been forthcoming with requested information, but the information is nonetheless imperfect or incomplete, EPA will construct an estimate of the party's quantity incorporating reasonable assumptions.

MSW G/Ts settling pursuant to the final policy will be required to waive their contribution claims against other parties at the site. In situations where there is more than one generator or transporter associated with the same MSW, the settling party will not be required to waive its contribution claims for that waste against any non-settling parties associated with the same waste.

Municipal Owner/Operator Settlements:

A second purpose of this proposal is to provide a consistent methodology for constructing proposals for municipalities that are potentially liable as past or present owners or operators of co-disposal landfills. Pursuant to this proposal, the U.S. will offer settlements to municipal O/Os of co-disposal facilities who wish to settle; those municipal O/Os who do not settle with EPA will remain subject to site claims by EPA and other parties.

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[2] "Estimates of the Volume of MSW and Selected Components in Trash Cans and Landfills," Franklin Assoc., the Garbage Project (1990); prepared for the Council for Solid Waste Solutions.

[3] "Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA," OSWER Directive 9835.16 (Feb. 22, 1991).

EPA recognizes that some of the co-disposal landfills listed on the NPL are or were owned or operated by municipalities in connection with their governmental obligation to provide basic sanitation and trash disposal services to residents and businesses. In many cases municipalities opened the landfills initially solely to serve their own communities. EPA believes that those factors, along with the non-profit status of municipalities and the unique fiscal planning considerations that they face, warrant a national settlement policy that provides municipal O/Os with reasonably consistent and equitable settlements.

Proposed O/O Methodology:

EPA proposes 20% of total response costs for a site as a baseline presumption to be considered as settlement amount for an individual municipal O/O to resolve its liability at the site. Regions will have the discretion to deviate from the presumption (not to exceed 35%) based on a number of site-specific factors. The 20% baseline is an individual cost share and pertains solely to a municipal O/O's liability as an O/O. EPA recognizes that, at some sites, there may be multiple liable municipal O/Os and the Region may determine that it is appropriate to settle for less than the presumption for an individual O/O. A group or coalition of two or more municipalities with the same nexus to a site, at the same time or during continuous operations under municipal control, should be considered a single O/O for purposes of developing a cost share (e.g., two cities operated together in joint operations or in cost sharing agreements). In cases where a municipal O/O is also liable as an MSW G/T, EPA would offer to resolve such liability for an additional payment amount developed pursuant to the MSW G/T settlement methodology.

EPA proposes the 20% baseline settlement contribution on the basis of several considerations. EPA examined the data from past settlements of CERCLA cost recovery and contribution cases with municipal O/Os at co-disposal sites where there were also PRPs who were potentially liable for the disposal of non-MSW, such as industrial waste. In examining that data, EPA considered that such historical settlements also typically reflected resolution of the municipality's liability not only as an owner/operator, but also as a generator or transporter of MSW. Under the final policy, such liability will be resolved through payment of an additional amount, calculated pursuant to the MSW G/T methodology. The 20% baseline does not reflect this separate basis for liability and the respective additional payment.

The 20% baseline figure also reflects the requirement that municipal O/Os that settle under the final policy will be required to waive all contribution rights against other parties as a condition of settlement. By contrast, in many historical settlements, municipal O/Os retained their contribution rights and hence were potentially able to seek recovery of part of the cost of their settlements from other parties.

In addition, the 20% baseline figure reflects EPA's evaluation of public interest considerations relating to municipalities. For example, Section 122(e)(3) of CERCLA authorizes the President to perform "nonbinding preliminary allocations of responsibility" for the purpose of promoting settlements and to include "public interest considerations" in developing such allocations. EPA believes it is in the public interest to consider collectively: the unique public

health obligation of municipalities to provide waste disposal services to their citizens; the municipalities' non-profit status; and the unique fiscal planning considerations for municipalities that require multi-year planning.

Under this proposal, the Regions may adjust the settlement in a particular case upward from the presumptive percentage, not to exceed a 35% share, based on consideration of the following factors:

(1) whether the municipality performed specific activities that exacerbated environmental contamination or exposure (e.g., the municipality permitted the installation of drinking wells in known areas of contamination);

(2) whether the O/O received operating revenues net of waste system operating costs during ownership or operation of the site that are substantially higher than the O/O's presumptive settlement amount pursuant to this policy; and

(3) whether an officer or employee of the municipality has been convicted of performing a criminal activity relating to the specific site during the time in which the municipality owned or operated the site.

The Regions may adjust the presumptive percentage down based on whether the municipality, on its own volition, made specific efforts to mitigate environmental harm once that harm was evident (e.g., the municipality installed environmental control systems, such as gas control and leachate collection systems, where appropriate; whether the municipality discontinued accepting hazardous waste once groundwater contamination was discovered; etc.). The Regions may also consider other equitable factors at the site.

Financial Considerations in Settlement:

In all cases under this proposal, the U.S. will consider municipal claims of limited ability to pay. Municipalities making such claims are required to provide Regions all necessary documentation relating to the claim. Recognizing that municipal O/Os may be uniquely situated to perform in-kind services at a site (e.g., mowing, road maintenance, structural maintenance), EPA will carefully consider any forms of in-kind services that a municipal O/O may offer as partial settlement of its cost share.

Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

RE: Skinner Landfill Lawsuit (9/97)
PERSONNEL 1930-1990 (SSDs in Caps, others on Service Dept)

NAME	LAST KNOWN ADDRESS & PHONE	YRS WORKED	STATUS	YR BORN
Nunn, Leonard	dna	1946 -1972	Dec'd	
Geist, William	dna	1948 -1989	Dec'd	
Brinson, George	4233 E.Galbraith Rd	1956 -1970	UNK	1909
Yates, Harold	dna	1956 -1971	Dec'd	
Blankenship,Opal	Box 88, Majestic, KY	1958 -1972	UNK	1932
CAMP, J.HENRY	4324 Orchard Ln DP 891-6120	1959 -1975	Living	1923
Fairbanks, Carl	7719 Dearborn DP	1962 -1969	UNK	1903
McFerron, Fred	372 Elliot Ave	1962 -1967	UNK	1930
Whitaker, Andrew	6285 Snidercrest Dr.Mason	1962 -1970	UNK	1903
Bohanan, Walter	10854 Willfleet Dr.Cin 563-4204	1964 - PRESENT		1937
Russell, William	7705 Dearborn DP	1964 -1967	UNK	1906
Baker, Bill	dna	1965 -1988	Dec'd	
Compton, Grant	4044 Lansdowne Ave DP	1967 -1970	UNK	1938
Compton, George	7922 Blue Ash Rd DP Dave Frank 793-5017	1968 -1973	UNK	1936
Blankenship,Otis	4044 Lansdowne Ave DP ~~791-7143~~	1970 -1950	UNK	1950
Riesenberg,Larry	4224 Woodlawn Ave Cin 791-5942	1970 -1972	UNK	1950
Peer, Charles	1012 Hunt Ave,Hamilton	1971 -1977	UNK	1952
Newton, Glen	dna	1972 -1981	Dec'd	
Conover, George	dna	1972 -1978	Dec'd	
Montgomery,Junior	15 E.Lakeshore Dr.#7	1973 -1986	Living	1937
Moore, Roy	5237 Galley Hill Rd.Mlfrd 831-9329	1973 -1978	Living	1940
Marsh, Timothy	8572 Donegal Dr Cin 984-0940	1973 -1977	UNK	1954
Kastrup, Dan	8091 Woodbine Ave Cin	1974 -1982	Living	1955
Gillis, Charles	4327 Oakwood Ave DP	1975 -1976	UNK	1952
ILLING, LOU	7817 Matson Ct DP 791-6412	1976 -1979	Living	1925
Skidmore,William	4326 Schenck Ave DP 242-4048	1977 -1980	UNK	1936
O'LEARY, DAVID	9122 Dominion Cir.Cin 794-8860	1979 - PRESENT		1951
Smith, Steve	4329 Redmont Ave DP 793-5708	1979 - PRESENT		1954
Thrasher,Richard	444 Featherwood Dr.Harr.45030	1979 -1985	Living	1953
Brinkman, Chris	8665 Antrim Ct Cin 984-4048	1980 - PRESENT		1961
Condon, Tim	3932 Hemphill Way DP 891-5711	1980 -1984	Living	1961
Stephenson, Gary	3945 Belfast Ave Cin 791-8940	1981 -1985	Living	1954
Brinkman, Tom	dna	1981 -1993	Dec'd	
George, Darren	4404 Orchard Ln DP 791-0399	1986 -1988	Living	1969
Hall, Dan	4161 Sandgate Ct. Cin 769-0120	1987 -1989	Living	1970
May, Jerry	4306 Webster Ave DP 791-5359	1988 - PRESENT		1950
Holt, Patrick	4232 Schenck Ave DP 791-1674	1990 -1992	Living	1971

CITY OF DEER PARK
4250 Matson Avenue
Deer Park, Ohio 45236

2ND CASE of Level 1 printed in FULL format.

AT & T Global Information Solutions Company, et al., Plaintiffs, vs. Union Tank Car Company, et al., Defendants.

Civil Action No. 2:94-876

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

1996 U.S. Dist. LEXIS 8167

March 18, 1996, FILED; March 19, 1996, Docketed

COUNSEL: [*1] For AT&T GLOBAL INFORMATION SOLUTIONS COMPANY, AMERICAN TELEPHONE & TELEGRAPH, GOODYEAR TIRE AND RUBBER COMPANY, STEEL CEILINGS INC, plaintiffs: John Thomas James Sunderland, Thompson, Hine & Flory - 2, Columbus, OH.

For ARMCO INC, defendant: John Anthony Kington, Eugene Baldwin Lewis, Chester Willcox & Saxbe - 2, Columbus, OH. John P Krill, Jr, James S Wrona, Craig P Wilson, Kirkpatrick & Lockhart, Harrisburg, PA.

JUDGES: John D. Holschuh, Chief Judge, United States District Court, Mag. Judge Mark R. Abel

OPINIONBY: John D. Holschuh

OPINION: MEMORANDUM AND ORDER

This matter is before the Court upon the parties' cross motions to dismiss [Record Nos. 64, 65 and 113]. The motions have been fully briefed and are ripe for decision.

INTRODUCTION

This is an environmental action in which plaintiffs seek to recover from defendants all costs plaintiffs have expended or will expend in a cleanup action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. § 9601,* et seq. [CERCLA], as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA]. Defendants have moved to dismiss plaintiffs' claims [*2] for joint and several liability or in the alternative to limit plaintiffs' recovery to contribution expenses. Defendants also seek dismissal of plaintiffs' claims for recovery of governmental oversight costs and attorneys' fees. Plaintiffs have moved to dismiss defendants' counterclaim for contribution expenses.

FACTUAL BACKGROUND

Defendant Granville Solvents, Inc., [GSI] owns real property located on Palmer Lane in Granville, Ohio [GSI Site]. From approximately 1958 until 1980, GSI operated a storage, distribution and recycling business at the GSI site. In 1986, GSI was ordered by the Ohio Environmental Protection Agency [Ohio EPA] and the Licking County Court of Common Pleas to cease operations. On June 18, 1990, the Ohio EPA commenced removal of the drums and tanks of waste chemical solvents and residues located at the GSI site. By October 11, 1991, the Ohio EPA completed its removal activities. However, it is alleged that some of the drums and tanks were in a rusted and deteriorated condition and had leaked their contents into the environment.

On September 7, 1994, plaintiffs entered into an Administrative Order of Consent [Consent Order] with the United States [*3] Environmental Protection Agency [EPA] pursuant to CERCLA. The Consent Order requires plaintiffs to engage in certain response actions at the GSI Site, including development and implementation of a site security plan, air monitoring program, comprehensive sampling and analysis plan, and groundwater monitoring and testing plan; installation of a groundwater extraction and treatment system; implementation of action to insure that any contaminated groundwater originating from the GSI Site meets all risk-based and applicable state and federal drinking standards; and other remedial measures, including reimbursing the government for the cost of overseeing the private party cleanup.

On September 9, 1994, plaintiffs filed the instant action, seeking joint and several liability against defendants for "the response costs Plaintiffs have incurred, and will incur, as a result of actual or threatened release of hazardous substances at the GSI Site." The complaint also seeks a declaration of rights as to defendants' liability for future response costs. Plaintiffs also seek

recovery of interest, costs and attorneys' fees incurred in connection with this litigation.

Defendants have moved to dismiss [*4] plaintiffs' complaint, arguing that plaintiffs are not entitled to recover all monies plaintiffs incurred in complying with the Consent Order under *42 U.S.C. § 9607* [CERCLA section 107], but are limited to contribution for expenses that plaintiff incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to *42 U.S.C. § 9613*(f)(1) [CERCLA section 113(f)(1)]. Defendants have also moved to dismiss plaintiffs' claims for attorneys' fees and for reimbursement of government oversight costs. [Record Nos. 64 and 113]. n1 In a related motion, plaintiffs have moved to dismiss defendants' counterclaims for contribution. [Record No. 65].

n1 The Court notes that subsequent to defendants' motion to dismiss, plaintiffs filed an amended complaint [Record No. 98]. The parties have stipulated that all pleadings related to dismissal of the complaint and counterclaims shall be deemed refiled and submitted to this Court for consideration with regard to the First Amended Complaint. [Record No. 113].

[*5]

DISCUSSION

The purpose of a motion under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the complaint. When considering a motion to dismiss pursuant to Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983); Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982),* cert. denied, *460 U.S. 1086; Smart v. Ellis Trucking Co., 580 F.2d 215, 218 n.3 (6th Cir. 1978),* cert. denied, *440 U.S. 958, 59 L. Ed. 2d 770, 99 S. Ct. 1497 (1979); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976).* Although the Court must liberally construe the complaint in favor of the party opposing the motion to dismiss, *Kugler v. Helfant, 421 U.S. 117, 125-26 n.5, 44 L. Ed. 2d 15, 95 S. Ct. 1524 (1975); Smart, 580 F.2d at 218 n.3; Davis H. Elliot Co. v. Caribbean Utils. Co., 513 [*6] F.2d 1176, 1182 (6th Cir. 1975); Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975),* it will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *Blackburn v. Fisk Univ., 443 F.2d 121, 124 (6th Cir. 1971); Sexton v. Barry, 233 F.2d 220, 223* (6th Cir.), cert. denied, *352 U.S. 870, 1 L. Ed. 2d 76, 77 S. Ct. 94 (1956).* The Court will, however, indulge all reasonable inferences that might be drawn from the pleading. *Fitzke v. Shappell, 468 F.2d 1072, 1076-77 n.6 (6th Cir. 1972).*

When determining the sufficiency of a complaint in the face of a motion to dismiss, a court will apply the principle that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* See also *McLain v. Real Estate Bd., 444 U.S. 232, 246, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983),* cert. denied, *469 U.S. 826, 83 L. Ed. 2d 50, 105 S. Ct. 105 (1984).* Because [*7] a motion under Rule 12(b)(6) is directed solely to the complaint itself, *Roth Steel Prods., 705 F.2d at 155; Sims v. Mercy Hosp., 451 F.2d 171, 173 (6th Cir. 1971),* the focus is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *Scheuer, 416 U.S. at 236; McDaniel v. Rhodes, 512 F. Supp. 117, 120 (S.D. Ohio 1981).* Extrinsic evidence cannot be considered in determining whether a complaint states a claim upon which relief can be granted. *Roth Steel Prods., 705 F.2d at 155; Sims, 451 F.2d at 173.*

A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. *United States v. School District, 577 F.2d 1339, 1345 (6th Cir. 1978); Dunn, 697 F.2d at 125; Westlake, 537 F.2d at 858.* Rule 8(a)(2) Federal Rules of Civil procedure, requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." The function of the complaint is to afford the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See *Dunn, 697 F.2d at 125; Westlake, 537 F.2d at 858.* [*8] The Court will grant a motion for dismissal under Rule 12(b)(6) only if there is an absence of law to support a claim of the type made or of facts sufficient to make a valid claim or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. See generally *Rauch v. Day & Night Mfg., 576 F.2d 697, 702 (6th Cir. 1978); Ott, 523 F.2d at 1369; Brennan v. Rhodes, 423 F.2d 706 (6th Cir. 1970).*

A. COST RECOVERY VS. CONTRIBUTION.

The Comprehensive Environmental Response Compensation and Liability Act of 1980 [CERCLA],

42 U.S.C. § 9601, et seq., was enacted "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989)* (quoting H.R.Rep. No. 1016(I), 96th Cong., 2d Sess. 22, reprinted in 1980 U.S.C.C.A.N. 6119, 6125). In *Walls v. Waste Resource Corp., 823 F.2d 977 (6th Cir. 1987)*, the Sixth Circuit Court of Appeals recognized that CERCLA was intended "primarily to facilitate the prompt cleanup [*9] of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *Id. at 981.* (emphasis added).

In 1986, Congress reauthorized and amended CERCLA by the Superfund Amendments and Reauthorization Act [SARA], *42 U.S.C. § 9601*, et seq., Pub. L. 99-499, 100 Stat. 1613 (1986). Among other things, SARA established the Hazardous Substance Superfund [Superfund], *26 U.S.C. § 9507*, to finance the government's response to actual or threatened releases of hazardous materials. The Superfund is financed through general revenue appropriations, certain environmental taxes, monies recovered under CERCLA on behalf of the Superfund, and CERCLA authorized penalties and punitive damages. *R.W. Meyer, 889 F.2d at 1500* (describing in detail CERCLA and the SARA amendments).

CERCLA authorizes the government to respond to any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat by taking "remedial" or other "removal" action. *42 U.S.C. § 9604* (a) [CERCLA section 104(a)]. n2 In responding to these environmental threats, the EPA uses Superfund money to take [*10] direct response actions that are consistent with the National Contingency Plan [NCP]. n3 If the government performs the cleanup, it may recover all its response costs from all persons responsible for the release of a hazardous substance pursuant to *42 U.S.C. § 9607*(a) [CERCLA section 107(a)].

n2 CERCLA section 104(a), *42 U.S.C. § 9604*(a), provides in part that:

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility . . . or any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. . . . [*11]

n3 The National Contingency Plan [NCP] is described at *42 U.S.C. § 9605* and is set forth at 40 C.F.R. Part 300, et seq. The NCP sets forth "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . . ." *42 U.S.C. § 9605.*

CERCLA section 107(a) provides in part that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity at any facility or incineration vessel owned or operated by any other party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted [*12] any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which caused the incurrence of response costs,

of a hazardous substance, shall be liable for

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Liability under CERCLA section 107(a) among responsible parties is joint and several.

As an alternative to cleaning up the hazardous waste site, the government is authorized under *42 U.S.C. § 9606*(A) [CERCLA section 4106(a)] n4 to order and oversee a private party cleanup in which responsible parties [*13] carry out necessary removal and remedial actions. See *United States v. Rohm & Haas, 2 F.3d 1265, 1270 (3rd Cir. 1995)* (explaining the two mechanisms provided by CERCLA for cleaning up waste sites). Prior to the enactment of the SARA amendments, courts permitted responsible parties who conducted removal actions to seek contribution recovery against other potentially responsible parties [PRPs] under CERCLA section 107(a). Although section 107(a) does not expressly provide for a right of contribution among PRPs, courts have implied this right to alleviate the harsh results of holding one party jointly and severally liable for all response costs when other parties were also responsible for damages at the cleanup site. *Key Tronic Corp. v. United States, 128 L. Ed. 2d 797, 114 S. Ct. 1960, 1965, n. 7 (1994)* (quoting *Walls v. Waste Resources, 761 F.2d at 318*) (holding that district courts "'have been virtually unanimous'" in holding that § 107(a)(4)(B) creates a private right of action for the recovery of necessary response costs").

n4 CERCLA section 106, *42 U.S.C. § 9606*, provides in part that:

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA section 106(a).

[*14]

When the SARA amendments were enacted, Congress expressly provided for the right of contribution among PRPs in *42 U.S.C. § 9613*(f) [CERCLA section 113(f)]. CERCLA section 113(f)(1) provides that:

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

CERCLA section 113(f)(1).

The right of contribution is limited, however, when PRPs do not enter into settlement agreements. Under CERCLA section 113(f)(2), a non-settling PRP is precluded from seeking contribution recovery against a settling PRP to the extent the [*15] expenses are matters addressed in the settlement agreement:

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount

of the settlement.

CERCLA section 113(f)(2).

A settling party's right to seek contribution from a non-settling party is not limited, however. *42 U.S.C. § 9613*(f)(3) [CERCLA section 113(f)(3)]. CERCLA section 113(f)(3) provides, in relevant part, that:

(3) Persons not party to settlement

. . .

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

CERCLA section 113(f)(3).

In the case sub judice, the EPA and plaintiffs entered [*16] into a judicially approved settlement agreement [Consent Order] pursuant to CERCLA section 106. The Consent Order requires plaintiffs to perform removal actions and to reimburse the United States in connection with the GSI Site. n5 Defendants were not signatories to the Consent Order.

n5 See In the matter of Granville Solvents Site, Docket No. V-W-94-C-248, Administrative Order Pursuant to Section 106 of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, *42 U.S.C. § 9606*(a).

This Order provides for performance of removal actions and reimbursement of response costs incurred by the United States in connection with property located at the Granville Solvents Site, Palmer Lance, Granville, Licking County, Ohio ("the Granville Site" or "the Site"). This Order requires the Respondents to conduct removal actions described herein to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.

[*17]

Plaintiffs filed the instant action seeking to hold defendants jointly and severally liable for all costs that plaintiffs have incurred and will incur in the future in complying with the Consent Order. Plaintiffs do not seek contribution recovery under CERCLA section 113(f), but want to recover all response costs, even those for which they are rightfully responsible. If plaintiffs obtain a judgment for joint and several liability against defendants, then defendants will be required to pay plaintiffs' share of the response costs in complying with the Consent Order, because defendants, as non-settling PRPs, are precluded from seeking contribution recovery against plaintiffs under CERCLA section 113(f)(2). n6 Defendants have moved to dismiss plaintiffs' joint and several liability claim for full cost recovery or in the alternative to limit plaintiffs' claims to contribution recovery. Therefore, this Court must determine whether plaintiffs are entitled to pursue a full cost recovery action for joint and several liability against defendants pursuant to CERCLA section 107(a) or whether plaintiffs are limited to contribution recovery.

n6 Defendants could, however, seek reimbursement under section 113(f)(3) from other non-settling parties; but, plaintiffs would nevertheless escape liability.

[*18]

Plaintiffs cite the Supreme Court's recent decision in *Key Tronic Corporation v. United States, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994)*, in support of their argument that they are entitled to pursue a full cost recovery action for joint and several liability under CERCLA section 107(a). Key Tronic does not stand for this proposition, however. In Key Tronic, the plaintiff - a potentially responsible party - entered into a settlement agreement with the EPA and then brought a section 107 full cost recovery action against other PRPs to recover a share of its cleanup costs. Id. at 1963. The plaintiff, Key Tronic, also sought recovery of attorneys' fees. The sole issue before the Supreme Court was whether attorneys' fees were recoverable as "necessary costs of response" under CERCLA section 107. The Court concluded that section 107 does not provide for the award of private litigants' attorneys' fees associated with bringing a cost recovery action. n7 The Court did not find that the plaintiff PRP could obtain full cost recovery pursuant to CERCLA section 107(a).

n7 See section C, infra, for a discussion of *Key Tronic Corporation v. United States, 114 S. Ct. 1060 (1994)*, and recovery of attorneys' fees under CERCLA.

[*19]

Plaintiffs argue that since Key Tronic pursued its cost

recovery action under section 107, then plaintiffs are entitled to do the same. Plaintiffs also maintain that the Key Tronic Court recognized the right of a PRP to pursue a section 107 cost recovery action when the Court stated that "the statute [CERCLA] now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in section 107." Id. at 1966.

Plaintiffs want this Court to find that because the Supreme Court allowed the plaintiff in Key Tronic to pursue a section 107(a) cost recovery action for a share of its cleanup costs (i.e., a contribution action under section 107(a)) then plaintiffs are entitled to pursue a full cost recovery action for joint and several liability against defendants under section 107(a). Plaintiffs argue that if Key Tronic had improperly pursued its cause of action under section 107(a), then the Supreme Court would not have granted certiorari or would have stated that the section 107(a) claim was improper. Plaintiffs' logic is flawed for several reasons.

First, the issue of whether Key Tronic's section [*20] 107 claim was properly pursued was never addressed by the Court and may not have been presented on appeal. Further, Key Tronic only sought contribution recovery under section 107 (a) to recover a share of its cleanup expenses. Thus, Key Tronic provides no guidance as to whether PRPs are entitled to pursue full cost recovery under section 107(a). See *United Technologies Corporation v. Browning-Ferris Industries, 33 F.3d 96 (1st Cir. 1994)*, cert. denied, *130 L. Ed. 2d 1128, 115 S. Ct. 1176 (1995)*, (holding that the Supreme Court's statement on which plaintiffs herein rely does not give PRPs carte blanch authority to choose whether they wish to pursue their claims under CERCLA section 107 or section 113).

Plaintiffs have made similar comparisons to Sixth Circuit decisions in which PRPs pursued cost recovery actions under section 107(a) against other PRPs: *Velsicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524 (6th Cir. 1993); Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)*, vacated and remanded, *114 S. Ct. 2668 (1994)* n8; and, *Anspec Co., Inc. v. Johnson Controls, Inc. 922 F.2d 1240 (6th Cir. 1991)*. Plaintiffs' reliance on these decisions is also misplaced.

n8 The judgment in *Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)*, was vacated and remanded to the Sixth Circuit Court of Appeals for further proceedings with respect to the award of attorneys' fees in light of the Supreme Court's decision in *Key Tronic v. United States, 126 L. Ed. 2d 609, 114 S. Ct. 652 (1994)*.

[*21]

The plaintiff in Velsicol, a PRP, alleged that the defendant was a potentially responsible party under CERCLA and sought both cost recovery pursuant to section 107(a) and contribution recovery pursuant to section 113(f). *Velsicol, 9 F.3d at 527.* The issue before the Court was whether the statute of limitations for a cost recovery claim under CERCLA should be applied retroactively to an accrued -but-not-yet- filed claim and whether the equitable defense of laches was available for a section 107 claim. The court of appeals held that the district court wrongfully concluded that the PRPs' cost recovery action was time barred. The court of appeals also held that the plaintiffs' cost recovery action under section 107(a) was not barred by the doctrine of laches. Accordingly, the court of appeals reversed the district court's dismissal of the section 107(a) claim and reinstated the section 113(f) contribution claim.

Contrary to plaintiffs' contention otherwise, Velsicol does not stand for the proposition that a PRP may pursue a full cost recovery action for joint and several liability under section 107(a) without being limited to the right of contribution under section [*22] 113(f). Although the court permitted the plaintiff PRP to proceed with a cost recovery action under section 107, the court contemplated that a contribution claim would be pursued. *Id. at 531.* ("Having concluded that the dismissal of the cost recovery claim was in error, we therefore reinstate the contribution claim."). Therefore, Velsicol is not persuasive.

Plaintiffs also cite Donahey v. Bogle for the proposition that they are entitled to recover all costs they incurred in the cleanup action. In Donahey, the plaintiffs purchased land that was contaminated with waste products. The plaintiffs and former owner agreed that the former owner would restore the land to an environmentally satisfactory condition and reimburse the plaintiffs for costs resulting from contamination of the land. The plaintiffs employed an environmental consultant to clean up some of the land, but the property was later abandoned after the plaintiffs realized that the cleanup effort was too costly. The plaintiffs later filed suit against the former owner to recover, among other things, costs incurred in attempting to cleanup the property.

The Sixth Circuit Court of Appeals held that the plaintiff [*23] and former owners were responsible parties under CERCLA section 107(a). The court of appeals affirmed the trial court's finding that the response costs the plaintiff incurred were not consistent with the National Contingency Plan and therefore not recoverable under CERCLA. Neither the district court nor the court of ap-

peals made any determination with respect to whether the plaintiff, as a PRP, could obtain full cost recovery for the expenses it incurred. This question was never raised, because the plaintiffs were not entitled to recover any costs they incurred. Hence, plaintiffs' reliance on Donahey in support of its full cost recovery claim is erroneous.

Plaintiffs' reliance on Anspec is similarly misguided. In Anspec the plaintiff PRP filed a section 107(a) action against a successor corporation that had been the owner of land that was subject to a cleanup order. The successor corporation was the owner when the pollution allegedly occurred. The opinion does not state whether the plaintiff sought full cost recovery for joint and several liability against the successor corporation or whether the plaintiff only sought reimbursement expenses. The sole issue before [*24] the court of appeals, however, was "whether a successor corporation resulting from a merger with a corporation that had released hazardous waste material on a previously owned site can be held liable for cleanup costs incurred by the present owner of the polluted property under [CERCLA] . . . ."

Plaintiffs argue that the Sixth Circuit's conclusion that Congress intended to include successor corporations within the description of entities that are potentially liable for CERCLA cleanup costs and the court's remand to the district court for further proceedings provides authority to allow PRPs to seek full cost recovery for joint and several liability under section 107(a). The Court does not accept plaintiffs' logic. First, there is no indication whether the plaintiff in Anspec sought joint and several liability or contribution recovery. That the court considered whether the successor corporation fell within the definition of a responsible party under section 107(a) does not mean that plaintiffs are entitled to pursue joint and several liability under section 107(a) for full cost recovery. Whether a party seeks full cost recovery under section 107(a) or contribution recovery [*25] under section 113(f), a court must determine whether the defendant is a liable party under section 107(a). *42 U.S.C. § 9613*(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title"). The issue of whether a PRP can seek full cost recovery under section 107(a) was not before the Anspec court and this Court declines to find an implied holding therein.

Finally, plaintiffs cite several district court decisions within the Sixth Circuit in which the courts allegedly "allowed the PRP to brings its cost recovery action for joint and several liability under § 107." These decisions are not persuasive.

In Gen Corp., Inc. v. Olin Corporation, Civil Action No. 5:93cv2269 (N.D. Ohio April 19, 1995), Magistrate Judge David Perelman held that a section 107 cost recovery action is not limited to claims by innocent parties, but potentially responsible parties could pursue both cost recovery actions under section 107 and contribution actions under section 113(f). Although the opinion does not set forth the factual background of the case, it appears that the PRP only sought to recover a share of its cleanup costs. [*26] Id. at p. 2, P 3. (PRP arguing that Gen Corp. was "partially responsible for the costs of cleaning up the waste sites . . . ."). Thus, the issue before the Donahey court was not whether the PRP could pursue a full cost recovery action for joint and several liability and escape all liability under section 107. Magistrate Judge Perelman found that a PRP could choose whether to pursue a contribution action under CERCLA section 107(a) or CERCLA section 113(f). Plaintiffs herein want to pursue full cost recovery under CERCLA section 107(a); hence, Gen Corp. is not helpful.

Plaintiff's reliance on Judge Kinneary's decision in Mead Corp. v. United States, No. 2:92-326, *1994 U.S. Dist. LEXIS 14261* (S.D. Ohio Jan. 14, 1994), is also misplaced. The Meade court held that a potentially responsible party could bring a joint and several liability cost recovery action under section 107(a). The court contemplated, however, that the defendant PRP would counterclaim for contribution recovery. Hence, the court did not envision the plaintiff PRP escaping all liability as plaintiffs herein desire. The court held that "a person found to be jointly and severally liable under [*27] section 107 may limit his damages by seeking contribution under section 113 from any other responsible person, including the plaintiff who brought the section 107 action." Id. at *26. Clearly, Judge Kinneary was not considering facts presented in the instant action where the defendant PRP is precluded under section 113(f)(2) from pursuing a counterclaim against the plaintiff because the defendant PRP did not enter into a settlement agreement with the EPA. See also *T H Agriculture Co., Inc. v. Aceto Chemical Co., Inc., 884 F. Supp. 357*, (E.D. Cal. 1995) (rejecting the Meade court's approach as duplicitous); *Oshtemo v. American Cyanamid Co., 1993 U.S. Dist. LEXIS 13176*, No. 92cv843, 1993 WL 561814 at *2 (W.D. Mich. Aug. 16, 1993) (holding that a PRP could choose whether to pursue a cost recovery action under section 107(a) or a contribution action under section 113(f), but contemplating that if the section 107 claim was filed, then a second suit for contribution would be pursued by the defendant PRP). *Kelley v. Thomas Solvent Co., 790 F. Supp. 710, 718 (W.D. Mich. 1990)* (same); *Bethlehem Iron Works v. Lewis Indus., No. 94-0752, 891 F. Supp. 221, 1995*

U.S. Dist. LEXIS 8477 *12-13 [*28] (E.D. Pa. June 21, 1995) (holding that the PRP could pursue either a cost recovery action under section 107 or contribution action under section 113, but concluding that "any unfairness that might result in imposing joint and several liability on Johnston will be remedied through the resolution of [the defendant PRP's] counterclaim for contribution . . ." and recognizing that the right to pursue a section 107(a) cost recovery action should be limited when the contribution protection of section 113(f)(2) is threatened); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1277 (E.D. Va. 1992)* (allowing PRPs to maintain a section 107(a) cost recovery action, but retaining jurisdiction over the matter throughout the contribution phase such that liability could be equitably apportioned).

Although not binding on this Court, defendants have cited decisions from other circuits in which potentially responsible parties' rights were limited to contribution recovery; the Court finds these decisions persuasive. See *United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 101 (1st Cir. 1994)*, cert. denied, *130 L. Ed. 2d 1128, 115 S. Ct. 1176 (1995)*; [*29] *Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994); United States v. Colorado & Eastern R. Co., 50 F.3d 1530,* 1995 WL 115720 at *3-5 (10th Cir. 1995). See also *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc., 904 F. Supp. 644,* 1995 WL 764134 (N.D. Ohio 1995); *T H Agriculture & Nutrition Co. v. Aceto Chemical Co., 884 F. Supp. 357,* (E.D. Cal. 1995); *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1214 (N.D. Cal. 1994);* Ciba-Geiga Corp. v. Sandoz Ltd., No. 92-4491, 1993 WL 668325 (D.N.J. June 17, 1993). These decisions illustrate and explain the problems encountered when potentially responsible parties are permitted to pursue full cost recovery actions under section 107(a). First, the plaintiffs' proposed plan ignores the Congressional intent underlying CERCLA to hold potentially responsible parties accountable for their actions. Second, if potentially responsible parties are permitted to seek full recovery under section 107(a), then the contribution protection of section 113(f)(2) will be eliminated. Finally, other [*30] difficulties arise when a potentially responsible party seeks to escape all liability for its actions by holding a non-settling defendant PRP liable for all costs incurred in a cleanup action.

1. Legislative Intent

In *Anspec Co. Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)*, the Sixth Circuit Court of Appeals identified two essential purposes of CERCLA: (1) "to provide the federal government with the tools immediately necessary for a swift and effective response to hazardous waste sites[,]" and (2) to hold "those responsible for disposal of chemical poisons [accountable for] the cost and responsibility of remedying the harmful conditions they created." Id. (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)* and H.R. No. 96-1016(II), 96th Cong., 2d Sess. 17 (1980), reprinted in, 1980 U.S.Code Cong. & Admin. News 6119, 6119-120). See also *Velsicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524, 529 (6th Cir. 1993)* (holding that "absent a specific congressional intent to the contrary, we will broadly interpret the CERCLA provisions in accordance with CERCLA's statutory goals of facilitating [*31] expeditious cleanups of inactive and abandoned hazardous waste sites and holding the responsible parties liable for the cleanups"); *Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995)* ("CERCLA's dual goals are to encourage quick response and to place the cost of that response on those responsible for the hazardous conditions.").

Awarding plaintiffs, as potentially responsible parties, a judgment for joint and several liability against defendants for full cost recovery, when defendants are precluded from seeking contribution expenses against plaintiffs under section 113(f)(2), would permit plaintiffs to escape all liability for their part in creating the environmental hazard at the GSI site. This scheme opposes Congress' intent to hold responsible parties accountable when they create harmful environmental conditions. Although section 113(f)(2) was intended to protect settling parties, it was not designed to shield them from all responsibility. See *United States v. Pretty Products, 780 F. Supp. 1488, 1494 (S.D. Ohio 1991)* (explaining the "carrot and stick" approach of section 113(f)). n9 Thus, this Court declines to accept plaintiffs' argument that they [*32] are entitled to pursue a full cost recovery action under section 107(a) against defendants.

n9 The Court rejects plaintiffs' characterization of the "carrot and stick approach" as immunizing settling PRPs from all liability. The court in *United States v. Pretty Products, 780 F. Supp. 1488, 1494 (S.D. Ohio 1991)*, explained the effect of section 113(f):

Congress's goal of achieving expeditious settlements was furthered through Section 9613(f)(2), which places non-settling Defendants who have paid more than their proportionate share of liability at a disadvantage in two ways. First, it leaves them open to contribution claims from settling Defendants who

have paid more than their proportionate share of liability. Second, if the settling Defendants have paid less than their proportionate share of liability, Section 113(f)(2) apparently compels the non-settlers to absorb the short fall.

Id. (quoting *Central Illinois Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1504 (W.D. Mo. 1990)).*

[*33]

2. Eliminates Contribution Protection.

The second problem with plaintiffs' full cost recovery proposal is that the plan frustrates the CERCLA contribution scheme by eliminating the contribution protection of section 113(f)(2). There is no dispute that "CERCLA was intended primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility on those responsible for hazardous wastes." *Hardage, 733 F. Supp. 1424 at 1431* (citing *Walls, 823 F.2d 977 at 981).* In order to encourage prompt settlement, the SARA amendments provided a contribution scheme that protects settling PRPs from contribution suits by non-settling PRPs. *42 U.S.C. § 113*(f)(2). See *Control Data Corp., 53 F.3d at 936* (explaining section 113(f)(2) contribution protection). CERCLA section 113(f)(2) provides that a party who settles with the government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Under this plan, the settling party is assured that once it enters into a settlement agreement with the government, a non-settling party cannot make a claim for contribution against the settling party. This section "was [*34] designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *United Technologies, 33 F.3d at 103* (quoting *United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990)).*

If the Court were to accept plaintiffs' argument that PRPs can bring cost recovery actions against other PRPs for full cost recovery under section 107(a), then a non-settling PRP could circumvent the contribution limitation of section 113(f)(2) by filing a joint and several liability cost recovery action against a settling PRP pursuant to section 107(a). Section 113(f)(2) only precludes contribution actions, not cost recovery actions under section 107(a).

The First Circuit recognized this problem in United Technologies when it held that "the mechanism for encouraging settlement would be gutted were courts to share [this] view of the contribution universe, for section [113(f)(2)] then would afford very little protection." *33 F.3d at 103,* Further, there would be no incentive to make a prompt settlement if the settling PRP could be pursued by a non-settling PRP for joint and several liability under section 107(a). See also [*35] *Colorado & Eastern R. Company, 50 F.3d at 1536* (holding that to allow PRPs to recover expenditures incurred in cleanup and remediation from other PRPs under section 107's strict liability scheme would render section 113(f) meaningless); The Ekotek Site PRP Comm. v. SELF, No. 94-*C-277K, 881 F. Supp. 1516, 1995 U.S. Dist. LEXIS 4707* at *10-11 (D. Utah Mar. 24, 1995) (adopting Colorado & Eastern R. Company).

3. Ignores Contribution Scheme.

Plaintiffs fail to recognize that if CERCLA section 107(a), prior to the enactment of the SARA amendments, authorized PRPs to obtain full cost recovery, then enacting the contribution scheme of section 113(f) was superfluous. Under plaintiffs' proposed scheme, apportioning liability among PRPs would require separate full cost recovery actions by each PRP. The district court in Ciba-Geigy Corp. v. Sandoz, No. 92-4491, 1993 WL 668325 (D.N.J. June 17, 1993), recognized the advantage of apportioning liability in one contribution action. In Ciba-Geigy, the plaintiff PRP sought to recoup all its cleanup costs from the defendant PRPs under section 107(a). The court, however, limited the plaintiff's claim to contribution recovery [*36] under section 113(f). The court held:

It is clear that Congress reacted to the uncertainly [sic] regarding a PRP's right to seek contribution by enacting § 113(f) for if a PRP could have already recovered its full response costs under § 107(a), there would have been no need to authorize a PRP to recover a portion its [sic] expenses in contribution. Section 113(f)'s legislative history thus indicates that Congress was enacting a provision to benefit non-governmental PRPs, one not needed by the United States. [footnote omitted]. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979).*

Id. at *6. Adopting plaintiffs' proposed plan would ignore Congress' intent to limit PRPs to contribution recovery. Thus, plaintiffs' claim must be limited to contribution recovery.

4. Other Problems.

Courts have also recognized other problems with allowing PRPs to seek full cost recovery actions under section 107(a). See *United Technologies, 33 F.3d at*

101 (holding that permitting a potentially [*37] responsible party to pursue a joint and several liability action under section 107 (a) against another PRP, rather than require that the action be maintained under section 113(f), would "completely swallow section [113(g)(3)'s] n10 three-year statute of limitations associated with actions for contribution" and would ignore the requirement that courts "give effect to each subsection contained in a statute. . . ."); *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1215 (N.D. Cal. 1994)* (case in point n11 finding the United Technologies rationale regarding statutory language persuasive and holding that "any and all responsible parties, even those who have expended response costs voluntarily, are confined to bringing contribution actions under § 9613(f).").

n10 CERCLA section 113(g), *42 U.S.C.* § *9613*(g), provides in part that:

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced-

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this paragraph.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after-

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages. [*38]

n11 The issue involved in *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1215 (N.D. Cal. 1994)*, was "whether a potentially responsible party ("PRP") under CERCLA is restricted to bringing a contribution claim under § 9613(f) or whether it may also pursue a cost recovery action under 9607(a).") [footnote omitted].

Having considered the authority submitted by the parties, the Court concludes that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all expenses incurred in the cleanup, but are limited to contribution recovery. See also Plaskon Electronic Materials, Inc. v. Allied Signal, Inc., No. 92cv7572 (N.D. Ohio Aug. 4, 1995) (holding that the plaintiff PRP could not seek joint and several liability against a defendant PRP, but was limited to seeking contribution recovery under section 113(f)); *Control Data Corp., 53 F.3d at 934-935* (holding that "recovery of response costs by a private party under CERCLA is a two-step process. [footnote omitted]. Initially a plaintiff must prove that the defendant is liable [*39] under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner. . . . Once liability is established, the focus shifts to allocation. Hence the question is what portion of the plaintiff's response costs will the defendant be responsible for? Allocation is a contribution claim controlled by § 9613(f) . . . ."); *Akzo Coatings, Inc., 30 F.3d at 764* (rejecting PRP's attempt to characterize its contribution claim as a cost recovery action under section 107(a) and holding that "whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f)"); T H Agriculture & Nutrition Co., Inc., No. CV-F-93-5404 at pp. 9-12 (holding that PRPs are limited to seeking contribution recovery from other PRPs).

Based on the foregoing, defendants' alternative motion to limit plaintiffs' recovery to contribution expenses is granted.

B. Governmental Oversight Costs.

The Administrative Consent Order [Consent Order] requires plaintiffs to reimburse the government [*40] for "all past response costs and oversight costs of the United States related to the [GSI Site] that are not inconsistent with the NCP [National Contingency Plan]." Administrative Consent Order, § VII. The Consent Order defines "oversight costs" as "all costs, including but not limited to direct and indirect costs, that

the United States incurs in the review or development plans, reports and other items pursuant to this AOC." Id. Plaintiffs seek to recover these costs from defendants as necessary response costs. Defendants argue that these costs are not recoverable.

The Third Circuit Court of Appeals addressed this identical issue in *United States v. Rohm & Haas Company, 2 F.3d 1265 (3rd Cir. 1993)*, and concluded that the governmental oversight costs of private party cleanups are not recoverable as necessary response costs. The Sixth Circuit Court of Appeals has never addressed this issue; but, in *United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989)*, the court held that when the government conducts a cleanup action under CERCLA, it may recover both direct and indirect costs attributable to the cleanup site under CERCLA section 107(a). In light of [*41] R.W. Meyer, the Court finds that the Sixth Circuit would permit the government to recover from plaintiffs the government's cost of overseeing the private party cleanup.

CERCLA provides two separate mechanisms for cleaning up waste sites: a government conducted cleanup under CERCLA section 104 followed by a cost recovery action under section 107, or a private party cleanup, ordered by the EPA, pursuant to CERCLA section 106. n12 *Rohm & Haas, 2 F.3d at 1270.* CERCLA section 106 authorizes the EPA to sue private parties, or to issue administrative orders, in order to compel such parties to cleanup hazardous waste sites at their own expense. *Id. at 1270.* The Administrative Order of Consent in the instant action was entered into pursuant to CERCLA section 106.

n12 See, infra, fn. 4.

CERCLA section 107(a) provides for the recovery of response costs from all persons responsible for the release of hazardous substances. The term "respond" or "response" means remove, removal, remedy and remedial action [*42] and the enforcement activities related thereto. *United States v. Witco Corp., 853 F. Supp. 139, 142, n. 6 (E.D. Pa. 1994)* (citing *42 U.S.C. § 9601* (25)). "Removal" is defined under CERCLA as:

[1] the cleanup or removal of released hazardous substances from the environment, [2] such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, [3] such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances, [4] the disposal of removal material, or [5] the taking of such other actions as may be necessary to prevent, minimize, or mitigate damages to the public health or welfare or the environment, which may otherwise result from a release or threat of release.

CERCLA section 101(23), *42 U.S.C. § 9601(23)*. Categories three and five of section 101 (23) provide the government with authority to recover from plaintiffs the costs the government incurs in ensuring that plaintiffs comply with the Consent Agreement. Hence, plaintiffs are entitled to recover contribution from defendants for such costs, provided the costs are otherwise recoverable. [*43]

Interpreting the definition of removal to include recovery of governmental oversight costs of monitoring private party cleanups is also consistent with the funding of the Superfund, which provides the resources for governmental enforcement of CERCLA and derives its funds from general revenues, environmental taxes, monies recovered under CERCLA, and CERCLA authorized penalties and punitive damages. *United States v. Lowe, 864 F. Supp. 628, 630 (S.D. Tex. 1994)* (rejecting the reasoning of Rohm and Haas as unpersuasive). In Lowe, the district court agreed with this interpretation of the statute:

This Court respectfully finds the reasoning in Rohm & Haas to be unpersuasive. EPA's oversight of cleanups conducted by liable parties fits squarely within the terms of CERCLA § 107(a) and § 101(23). Oversight necessarily encompasses the evaluation of all stages of the cleanup process, from the preliminary investigation throughout the final treatment, destruction, disposal or removal of hazardous substances on the site. Oversite is "necessary to prevent, minimize or mitigate" damages to the public welfare, and necessary to "monitor, assess, and evaluate" the release or threatened [*44] release of hazardous substances into the environment. The statute makes no distinction between the EPA's direct monitoring of a release and its monitoring of a private party cleanup response. Moreover, were this Court to embrace the Third Circuit's reasoning in Rohm & Haas, it would lead to the incongruous result that the EPA could recover the costs of overseeing its own contractors, but not the costs of overseeing those hired by the potentially responsible parties.

Id. at 631-32. See also *California Dept. of Toxic Substances Control v. Snydergeneral Corp., 876 F. Supp. 222, 224 (E.D. Cal. 1994)* (rejecting Rohm & Kaas and holding that "a proper construction of CERCLA allows administrative recovery of costs incurred in overseeing cleanup activities by either private parties or agencies.").

Accordingly, defendants' motion to dismiss plaintiffs' claim for recovery of contribution for expenses incurred in reimbursing the government for its oversight costs is denied.

C. Attorneys' Fees.

Defendants have also moved to dismiss plaintiffs' claim for attorneys' fees pursuant to the Supreme Court's recent decision in *Key Tronic Corporation v. United [*45] States, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994)*. Defendants admit that the Supreme Court did not foreclose recovery of attorneys' fees under any circumstances, but claim that plaintiffs have failed to allege any facts in their complaint that would allow recovery of attorneys' fees in the limited circumstances enunciated by the Key Tronic Court.

In Key Tronic, the Supreme Court considered whether attorneys' fees are "necessary costs of response" within the meaning of CERCLA. At issue were recovery of attorneys' fees for (1) litigation-related expenses; (2) legal services performed in connection with negotiations between the PRP and the EPA that culminated in the consent decree; and (3) fees pertaining to the corporation's activities performed in identifying other potentially responsible parties. The Court held that the attorneys' fees related to the first two types of expenses were not recoverable, but the third type of expenses, which were closely tied to the actual cleanup, were recoverable if they constituted a necessary response cost under section 107(a)(4)(B). The Court held:

The conclusion that we reach with respect to litigation-related fees does not signify [*46] that all payments that happen to be made to a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B). The component of Key Tronic's claim that covers the work performed in identifying other potentially responsible parties falls in this category. . . . Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. Key Tronic is therefore quite right to claim that such efforts significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs.

Id. at 1967.

In the First Amended Complaint, plaintiffs' seek "interest, costs and attorneys' fees incurred by Plaintiffs in connection with this action . . . ." To the extent plaintiffs seek recovery of attorneys' fees "that [are] closely tied to the actual cleanup [and] may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B)[,]" defendants' motion to dismiss is denied. To the extent that plaintiffs seek to recover [*47] attorneys' fees for litigation related fees or fees for legal services involved in the negotiation process which culminated in the consent decree, plaintiffs' claim must be dismissed. See *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (holding that a motion to dismiss should be granted where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

D. MOTION TO DISMISS COUNTERCLAIM FOR CONTRIBUTION.

Finally, plaintiffs have moved to dismiss defendants' counterclaim for contribution under CERCLA section 113(f)(2). As discussed above, CERCLA section 113(f)(2) provides contribution protection to potentially responsible parties who enter into settlement agreements with the EPA from contribution actions by non-settling PRPs to the extent the expenses are related to the settlement agreement. Accordingly, plaintiffs contend that defendants, as non-settling PRPs, are precluded from seeking contribution expenses against plaintiffs who entered into a settlement agreement with the EPA.

Defendants Dean & Barry Company assert the same arguments as presented in their motion to [*48] dismiss and maintain that if plaintiffs are permitted to seek full cost recovery under section 107(a) for joint and several liability, then defendants should be permitted to counterclaim so that defendants are not required to bear the costs for which plaintiffs are rightfully responsible. To the extent the Court held above that plaintiffs' claims are limited to a claim of contribution, plaintiffs' motion to dismiss defendants' counterclaim is granted.

Defendants Bradley Paint Company, Westinghouse Electric Corporation and IRD Mechanalysis, Incorporated, on the other hand, contend that plaintiffs' motion to dismiss should be denied because plaintiffs are only entitled to recover, if at all, for matters considered in the Consent Order between plaintiffs and the EPA. Defendants argue that the Consent Order by its express terms is limited to the performance of removal actions; therefore, plaintiffs are only entitled to contribution protection for removal activities. Defendants contend that it is too early in the litigation process to determine whether plaintiffs' expenditures were for removal costs.

There is no dispute that under section 113(f)(2) plaintiffs are protected from claims [*49] for contribution re-

garding matters addressed in the settlement agreement. Because discovery has not been completed, however, the Court cannot determine whether the costs plaintiffs seek were incurred pursuant to the Consent Order. Accordingly, to the extent plaintiffs' claims are for expenses addressed in the Consent Order, plaintiffs' motion to dismiss defendants' counterclaim for contribution is granted. Otherwise, the motion is denied.

CONCLUSION

In accordance with the foregoing, defendants' alternative motion to limit plaintiffs' claims to contribution recovery is GRANTED; defendants' motion to dismiss plaintiffs' claim for attorneys' fees is GRANTED IN PART and DENIED IN PART; defendants' motion to dismiss plaintiffs' claim for governmental oversight costs is DENIED; plaintiffs' motion to dismiss defendants' counterclaim is GRANTED to the extent defendants seek contribution for matters addressed in the settlement agreement, but DENIED to the extent plaintiffs have presented a claim for other expenses.

John D. Holschuh, Chief Judge

United States District Court

Not Reported in F.Supp.
65 USLW 2695
(Cite as: 1997 WL 382101 (S.D.Ohio))

AT & T GLOBAL INFORMATION SOLUTIONS COMPANY, et al., Plaintiffs,
v.
UNION TANK CAR COMPANY, et al., Defendants.

No. C2-94-876.

United States District Court, S.D. Ohio.

March 31, 1997.

MEMORANDUM AND ORDER

HOLSCHUH

*1 Plaintiffs, AT & T Global Information Systems, et al. [AT & T], have moved to strike certain affirmative defenses raised by the defendants. [Record No. 122]. The motion has been fully briefed and is ready for decision. [FN1]

Plaintiffs have moved pursuant to Fed.R.Civ.P. 12(f) to strike certain defenses of defendants as insufficient. Plaintiffs contend that defendants are limited to raising the defenses specifically enumerated in 42 U.S.C. § 9607(b), CERCLA § 107(b). Defendants argue that their defenses are valid and that plaintiffs' motion is moot in light of the Court's March 18, 1996 Memorandum and Order. [Record No. 192].

Plaintiffs initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that plaintiffs should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1). Defendants also moved to dismiss plaintiffs' claims for attorney's fees and for reimbursement of governmental oversight costs. In a related motion, plaintiffs moved to dismiss defendants' counterclaims for contribution.

By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. The Court held that plaintiffs, as potentially responsible parties, were not entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup. The Court also denied defendants' motion to dismiss plaintiffs' claim for recovery of expenses incurred by plaintiffs in reimbursing the government for its

oversight costs. In addition, the Court denied defendants' motion to dismiss plaintiffs' claims for attorney's fees. Thus, to the extent plaintiffs have moved to strike as insufficient those defenses raised in defendants' motion to dismiss, the motion to strike is overruled as MOOT.

Plaintiffs maintain that the defenses raised by defendants are insufficient because the available defenses in a CERCLA § 107 cost recovery action are limited to the defenses specifically enumerated at 42 U.S.C. § 9607(b), CERCLA § 107(b). Thus plaintiffs seek to have stricken any defenses not enumerated in the statute. Rule 12(f), Fed.R.Civ.P., provides in part that "[u]pon motion made by a party ... the Court may order stricken from the pleading any insufficient defense." Because striking a portion of a pleading is a drastic remedy, such motions are generally viewed with disfavor and are rarely granted. Brown and Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir.1953). Despite the cautious approach courts have taken in granting motions to strike, such motions have been granted in CERCLA actions because the defenses are, for the most part, governed and limited by statute.

*2 This is an action for reimbursement of response costs under CERCLA. As stated above, the Court determined in its March 18, 1996 Memorandum and Order that plaintiffs are limited to seeking contribution recovery under CERCLA § 113(f). Section 113(f) provides that: "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title [CERCLA section 107(a)]." Liability under section 107(a) is imposed where the government establishes the following four elements:

(1) The defendant falls within one of the four categories of responsible parties;
(2) The hazardous substances are disposed of at a facility;
(3) There is a release or threatened release of hazardous substances from the facility into the environment;
(4) The release causes the incurrence of response costs.

United States v. Alcan Aluminum Corp., 964 F.2d 252, 258-59 (3rd Cir.1992) (citing section 107(a)). Section 107(a) further provides that liability is imposed "subject only to the defenses set forth in subsection (b) of this section." 42 U.S.C. § 9607(a). These defenses are: (1) the release of waste caused by an act of God, (2) an act of war, (3) an act or omission of an unrelated third party, and (4) any combination thereof. Based on the language of the statue and the fact that CERCLA imposes strict liability "[a] strong majority of courts have held that liability under § 107(a) of CERCLA is subject to only the defenses set out in § 107(b)." United States v. Marisol, Inc., 725 F.Supp. 833, 838 (M.D.Pa.1989).

Given this background, the Court will address each defense challenged by plaintiffs.

1. Failure to State a Claim.

Each defendant asserts that the complaint fails "to state a claim upon which relief

can be granted." Although this defense is not one of the four enumerated in CERCLA Section 107(b), the defense is allowable pursuant to Fed.R.Civ.P. 12(b) and is often cited in CERCLA actions. United States v. Fidelcor Business Credit Corp., 1993 WL 276933 (E.D.Pa. Jul. 21, 1993). This type of challenge cannot succeed "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A review of the Second Amended Complaint shows that the complaint alleges all the requisite elements of CERCLA liability. Specifically, the complaint alleges that defendants are responsible parties; that hazardous substances were disposed of at a facility; that there was a release or threatened release of hazardous substances from the facility into the environment; and that said release or threatened release of hazardous substances has caused or will continue to cause plaintiffs to incur necessary costs of response [Second Amended Complaint, Record No. 208]. Accordingly, plaintiffs have sufficiently stated a claim for which relief may be granted. Therefore, the plaintiffs' motion to strike the defendants' defense of failure to state a claim upon which relief may be granted is GRANTED. See, e.g., Fidelcor, 1993 WL 276933 at * 3 (striking defense of failure to state a claim in a CERCLA action); Hatco Corp. v. W.R. Grace & Co., 801 F.Supp. 1309, 1327 (D.N.J.1992) (same); United States v. Kramer, 757 F. Supp 397, 418 (D.N.J.1991) (same); Marisol, 724 F.Supp. at 837 (same).

2. Attorney's Fees and Oversight Costs.

*3 Each defendant has also raised the defense of failure to state a claim upon which relief can be granted for attorney's fees and oversight costs.

a. Attorney's Fees.

Defendants also moved in a separately filed motion to dismiss plaintiffs' claim for attorney's fees. The Court, in its March 18, 1996 Memorandum and Order, denied defendants' motion to dismiss on this issue under the Supreme Court's decision in Key Tronic Corporation v. United States, 114 S.Ct. 1960 (1994), to the extent that plaintiffs sought recovery of attorney's fees "that [are] closely tied to the actual cleanup [and] may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B)." The Court, however, granted defendants' motion to dismiss to the extent plaintiffs sought recovery of attorney's fees for litigation related fees or fees for legal services involved in the negotiation process which culminated in the consent decree.

Accordingly, in light of the Court's decision regarding plaintiffs' claim for attorney's fees, plaintiffs' motion to strike is MOOT.

b. Oversight Costs.

Defendants also argue that plaintiffs' attempt to recover the expenses plaintiffs incurred for reimbursing the government for its oversight costs of the cleanup fails to state a claim upon which relief can be

granted. Defendants filed a separate motion to dismiss plaintiffs' claim for reimbursement of governmental oversight costs. Defendants' motion to dismiss was denied by the Court's March 18, 1996 Memorandum and Order. Accordingly, plaintiffs' motion to strike is denied as MOOT.

3. Equitable Defenses.

Defendants have raised several equitable defenses to plaintiffs' cost recovery claims, including: (1) plaintiffs' recovery should be reduced by amounts already paid by the defendants, (2) defendants' liability should be proportionate to the defendants' contribution to the release, (3) defendants should not be liable for any portion of damages caused by others, (4) unclean hands, (5) estoppel, and (6) waiver.

Although the equitable defenses, if proven, will not relieve defendants from liability, the equitable defenses may be considered by the Court under CERCLA section 113(f) in resolving contribution claims. See 42 U.S.C. § 9613(f)(1) (providing that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Therefore, inasmuch as the Court has determined that plaintiffs, as PRPs, are limited to seeking contribution recovery, plaintiffs' motion to strike defendants' equitable defenses is DENIED.

4. Causation.

Defendants have denied liability on the basis that they did not cause the release or threatened release and did not cause response costs at the response site. Plaintiffs maintain that the causation defense should be stricken, because CERCLA is a strict liability statute, which imposes liability without regard to causation.

*4 To establish a prima case in a CERCLA action, the plaintiff must prove that:

> (1) the defendant is within one of the four categories of responsible parties enumerated in § 9607(a); (2) the landfill site is a facility as defined in § 9601(9); (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the national contingency plan. 42 U.S.C. § 9607(a).

B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir.1996). There are only three defenses to imposition of liability on a generator: an act of God, an act or war, and an act or omission of a third party. 42 U.S.C. § 9607(b). See also U.S. v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir.1993). Courts have determined that "including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b)." Id. Thus, "CERCLA does not require the plaintiff to prove that the defendant caused actual harm to the environment at the liability stage." Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir.1995) (citing United States v. Alcan-Aluminum, 964 F.2d 252, 264-66 (3rd Cir.1992)); See

also B.F. Goodrich, 99 F.3d at 514 (holding that "it is not required that the [plaintiff] show that a specific defendant's waste caused incurrence of clean-up costs"). The Court recognizes, however, that there must be a showing that the response costs were incurred as a result of a release. Control Data Corp., 53 F.3d at 935, fn. 8.

Accordingly, to the extent defendants contend that they are not liable because they did not cause actual harm to the environment, plaintiffs' motion to strike is GRANTED.

5. Divisibility.

Plaintiffs seek to strike the defense that damages are divisible and distinct, therefore, joint and several liability may not be imposed. This Court has determined that plaintiffs as PRPs are limited to seeking contribution recovery and that plaintiffs cannot seek to recover from the defendant PRPs the portion of response costs for which plaintiffs are responsible. The Court's conclusion comports with the rule applied by many courts in CERCLA cases that "[i]f the harm is divisible and if there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of harm he himself caused." United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D.Ohio 1983); United States v. Colorado & Eastern R. Co., 50 F.3d 1530, 1535 (10th Cir.1995); In re Bell Petroleum Servs., Inc., 3 F.3d 889, 895 (5th Cir.1993). Therefore, while divisibility is not a complete defense to liability, it is a factor to be considered in apportioning responsibility to liable parties. Accordingly, plaintiffs' motion to strike is DENIED.

6. Set-off.

The defendants contend that plaintiffs' recovery is subject to set-off for amounts actually paid by other PRPs. Set-off is an equitable defense and may be considered in determining each responsible parties' liability under CERCLA section 113(f). Thus, plaintiffs' motion to strike this defense is DENIED.

7. Judicial Review of Administrative Order.

*5 In the present case, plaintiffs are attempting to impose liability on the defendants, in part, pursuant to the Administrative Order of Consent [AOC] that plaintiffs entered into with the EPA. Defendants have raised the defense that the AOC is arbitrary, capricious or otherwise contrary to law and lacks an adequate basis in the Administrative Record. Plaintiffs maintain that this defense is not one enumerated in CERCLA section 107(b) and is therefore precluded.

A review of the statutory provisions in question clearly contemplate that defendants are entitled to challenge the validity of the AOC. For example, CERCLA section 113(h) provides that:

> No Federal Court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action

selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title in any action except one of the following:
(1) An action under section 9607 of this title to recover response costs or damages or for contribution....
42 U.S.C. § 9613(h).

In addition, a district court may exercise jurisdiction pursuant to CERCLA section 113(h) to review challenges of remedial actions after the initiation of a cost recovery action under CERCLA section 107(a). The defense asserted by Armco, made after the initiation of plaintiffs' cost recovery action, challenges the remedial actions taken by plaintiffs. Accordingly, plaintiffs' motion to strike this defense is DENIED.

8. Constitutional Defense.

Plaintiffs contend that defendants are precluded from raising a due process challenge to the AOC, because defendants are not a party to and are not bound by the AOC. Defendants argue that constitutional challenges may be made in CERCLA actions when the defendant is challenging the constitutionality of CERCLA as applied to a specific factual context.

It is clear that constitutional challenges have been made in CERCLA cases. See, e.g., United States v. Fidelcor Business Credit Corp., 1993 WL 276933 (E.D.Pa. Jul. 21, 1993); LaSalle National Bank v. Owens-Illinois, Inc., 1994 WL 249542 (N.D.Ill. Jun. 7, 1994). Based on the present record, the Court cannot determine the validity of defendants' due process argument. Accordingly, without a more developed record and further legal argument the Court is not willing to strike defendants' constitutional defense. Therefore, plaintiffs' motion to strike defendants' constitutional challenge is DENIED.

9. Consistency with the National Contingency Plan.

Plaintiffs seek recovery of costs for performance of necessary response actions pursuant to the AOC. Defendants argue that the costs plaintiffs incurred were not consistent with the National Contingency Plan [NCP]. Plaintiffs maintain that strict compliance with the NCP is not a prerequisite in a private party cost recovery action. The statutory language clearly provides that responsible parties shall be liable for response costs that are consistent with the National Contingency Plan. Thus, while strict compliance in every detail may not be required, the response costs must be consistent with the NCP's requirements, which is recognized by the authority submitted by the plaintiffs. General Elec. Co. v. Litton Indus. Automation Servs., 920 F.2d 1415, 1420 (8th Cir.1990), cert. denied, 499 U.S. 937 (1991). Therefore, plaintiffs' motion to strike defendants' defense that the response costs incurred were not consistent with the National Contingency Plan is DENIED.

10. Facility Subject to RCRA.

*6 Defendants maintain that recovery of

response costs under CERCLA are not recoverable because the facility in question is a facility regulated by the Resources Conservation and Recovery Act of 1986 [RCRA], and therefore the facility should have been subject to a RCRA correction action.

Defendants have failed to set forth any argument whatsoever as to why plaintiffs' claim would be barred under CERCLA. Accordingly, plaintiffs' motion to strike defendants' RCRA defense is GRANTED.

11. Joinder of Necessary Parties.

Defendants maintain that plaintiffs have failed to join necessary parties in that the harm in this case is divisible and therefore liability may be apportioned to responsible parties. Plaintiffs maintain that liability under CERCLA is joint and several for responsible parties, thus it is not necessary to join all responsible parties.

Defendants have not identified which parties it claims to be necessary. Therefore, the Court cannot make a determination at this time regarding the merits of defendants' argument. Accordingly, plaintiffs' motion to strike is DENIED. The motion is denied without prejudice, however, and plaintiffs may seek leave to file a second motion to strike after the asserted necessary parties have been identified.

CONCLUSION

Based on the foregoing, plaintiffs' motion to strike insufficient defenses is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

FN1. To the extent plaintiffs' motion seeks to strike insufficient defenses raised by Gammatronix, Inc., plaintiffs' motion is moot. Gammatronix was dismissed from this action per stipulation of dismissal on January 13, 1997. [Record No. 278].

END OF DOCUMENT